IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 416.

THE DELAWARE AND HUDSON COMPANY,
APPELLANT,

vs.

THE ALBANY & SUSQUEHANNA RAILROAD CO., THE ÆTNA INSURANCE COMPANY, AND OTHERS,
APPELLEES.

REPLY BRIEF ON BEHALF OF APPELLANT.

The brief already filed by us has anticipated, and we think fully answered, most of the contentions of the appellees which have been suggested either in their brief or in oral argument. No useful purpose would therefore be subserved by mere reiteration of the principles of law and authoritative decisions of this court which we have cited in the brief already filed. Its decisions should control not only as the court of last resort, but because the question at issue turns principally upon the salutary rule of equity, which this court itself promul-

gated to prevent just such abuse of a stockholders' suit as is presented by the case at bar.

This reply brief will be mainly devoted to three propositions of the learned counsel for the appellees upon which, both in their brief and in the oral argument, they chiefly rely. These propositions are as follows:

> (1) That under the lease and supplemental lease the Delaware Company covenanted to pay the rent *directly* to the bondholders and stockholders respectively of the Susquehanna Company, and that there was therefore privity of contract between the Delaware Company and the complaining stockholders with respect to the claim now in suit.
>
> (2) That a preliminary demand upon the managing body of the Susquehanna Company to bring suit was excused because such managing body could not litigate the claim against the Delaware Company without perpetrating a fraud on the court.
>
> (3) That an appeal to the stockholders to cooperate in the institution of the suit was unnecessary, as the stockholders were without any corporate authority or function with respect to the conduct of litigation.

These propositions, by which the appellees attempt to excuse their failure to comply with Rule 94, will be treated in their order.

I.

APPELLEES' FIRST CONTENTION.

That under the lease and supplemental lease the Delaware Company covenanted to pay the rent directly to the bondholders and stockholders respectively of the Susquehanna Company, and that there was therefore privity of contract between the Delaware Company and the complaining stockholders with respect to the claim now in suit.

We have already shown in our principal brief (pages 4-7) that no such question is before this court. We then referred to a special and minor claim in the bill that the small surplus which was found to exist in the Albany Loan Sinking Fund account in 1902, and amounting with interest to $16,240.52, might be distributed directly to the stockholders under the guarantee of the nine (9) per cent. dividends, which under the supplemental lease commenced after the liquidation of the Albany loan. Apparently the counsel for the appellees have abandoned this contention, but—naturally apprehensive as to the application of Rule 94 to their stockholders' suit—they now attempt to sustain their suit upon the broader ground that as to its subject-matter there was a direct undertaking of the Delaware Company to distribute the sum in dispute directly to the stockholders thereof, and it is therefore suggested that the Susquehanna stockholders had such a direct contractual relation with the Delaware Company that this suit was in substance and effect not a stockholders' suit, but a suit upon a direct contract with the Susquehanna stockholders in their individual right. This

fanciful view has absolutely no support whatever in the terms of the agreement, and even if it had, the question is not before this court, for the only question as to which the Circuit Court of Appeals desires the instructions of this court is as to the right of these complaining stockholders *to sue in behalf of the Susquehanna Company for a debt alleged to be due to it.* While this is so, we will, however, briefly show how absolutely without foundation the suggestion is that as to the amount in controversy there was any obligation on the part of the Delaware Company to pay directly to each stockholder of the Susquehanna Company his proportionate share thereof.

The lease upon which the claim was based itself negatives any such suggestion. After providing that the Delaware Company would pay the interest charges upon the mortgage bonds, it further provides that the Delaware Company would

> "upon the first days of July and January in each year pay a semi-annual dividend of 3½ % upon the then existing shares of the capital stock of the said party of the first part, not exceeding 25,000 shares, and if so many shares do not exist at the time of any such payment or if the sums required for the payments before mentioned shall not amount to the aforesaid $490,000, the balance not applied to the payment of such interest and dividends shall be paid *to the said party of the first part* (the Susquehanna Company) it being understood, however, that the interest and dividends to be paid *as aforesaid* shall and may be paid directly to the respective bond and stockholders" (Rec., pp. 27, 28).

If there was any contention that we had failed to pay the seven (7) per cent. annual dividends thus provided for

(which were, under the supplemental lease, subsequently increased to nine (9) per cent. after the liquidation of the Albany Loan) there would be much force in the suggestion that each stockholder could, under his guarantee of such seven (7) per cent. dividends until 1903 and nine (9) per cent. dividends thereafter, sue the Delaware Company directly for them. The guarantee upon which suit would have been brought is as follows:

> "The President, Managers and Company of the Delaware & Hudson Canal Company, hereby, for value received, guarantees the payment of a semi-annual dividend of three and a half per cent upon the stock represented by the within certificate to be paid on the first days of January and July in each year, until the Albany City Bonds, which were loaned to the Albany and Susquehanna Railroad Company, to the amount of one million of dollars, shall be paid, by the operation of the sinking fund provided for their payment, and thereafter the said Canal Company guarantees to pay upon said stock *four and a half per cent semi-annually on the same days,* subject to the conditions and provisions of the lease made by said Railroad Company to said Canal Company, dated February 24th, 1870, and of an agreement supplemental thereto, dated the 7th day of March, A. D. 1876" (Rec., p. 38).

There is, however, no contention that the seven (7) and nine (9) per cent. dividends were not in point of fact paid, *and this suit was not brought to recover these dividends;* on the contrary, the bill directly states that they were, for it says, Section —:

> *"And your orators show that the said defendant, Delaware Company, has paid dividends, at said rate*

(9 per cent.) upon and since the first day of January, 1903, and that prior to said date, the said defendant paid dividends on said stock at the rate of seven (7) per cent., and no more" (Rec., pp. 17, 18).

While the bill did claim that the nine (9) per cent. dividends had not been paid as soon as the Albany City Loan was liquidated, this question was eliminated from the controversy, although it appeared that a small surplus remained in the Sinking Fund account, which at the time the Circuit Court rendered its decision was found by the Circuit Court Judge to be $23,896.02, and this sum was subsequently reduced on a reference to the Master, by agreement, to a sum, which with interest, amounted to $16,240.52. Whether this sum could have been paid as a part of the guaranteed dividends was not decided, for the Circuit Judge held that it was in any event due to the Susquehanna Company, and the $16,240.52 therefore became a part of the amount adjudged to be due the Susquehanna Company, which as stated was $1,107,923.24. For confirmation of these statements, which are only stated because of the obvious tendency of the appellees' brief to confuse the nature of the suit, we respectfully refer to the opinion of the Circuit Court as reported in 156 Federal Reporter, 132, of which we presume the court will take judicial cognizance for any proper purpose.

The opinion will show further, that with the exception of this relatively insignificant sum, *the entire sum adjudged to be due the Susquehanna Company was the amount of savings effected by the refunding of the Susquehanna mortgage loans;* and as to this, the lease and supplemental lease can be searched in vain for any covenant on the part of the Delaware Company to pay them directly to the Susquehanna

stockholders. Indeed, the very clause of the lease upon which appellees' claim was based, provided expressly that

> "If the sum required for the payments beforementioned shall not amount to the aforesaid $490,000.00, THE BALANCE NOT APPLIED TO THE PAYMENT OF SUCH INTEREST AND DIVIDENDS SHALL BE PAID TO THE SAID PARTY OF THE FIRST PART" (Susquehanna Company).

The "payments before mentioned" were the interest charges and the *fixed* 7 per cent. dividends.

And the bill itself averred:

> "Your orators further show that upon the retirement of bonds secured by the earlier mortgages above mentioned by later bonds bearing a lower rate of interest, the lessee was bound, under the provisions of said lease, to pay TO THE SUSQUEHANNA COMPANY the amount which it was then relieved from paying as interest upon said bonds; but your orators show that the defendant Delaware Company has failed and neglected so to do, but it has kept and retained to its own use all saving of interest so made."

The Circuit Court therefore simply followed the allegation of the bill, as well as the language of the lease, in decreeing that the amount was payable, if at all, TO THE SUSQUEHANNA COMPANY and not to the stockholders, and it is therefore the right of the Susquehanna Company to determine whether it will distribute it among its stockholders in the form of dividends, or use it in the payment of its indebtedness, or for any other purpose authorized by its charter. Certainly individual stockholders cannot insist upon a division of such assets until the majority, acting through its managing body,

shall determine *when and how* the fund in question shall be divided.

While all this is made necessary by the insistent attempt to suggest that the claim in controversy is a sum which the Delaware Company guaranteed to pay to the stockholders in their individual right, yet, we again insist that even if there was any clause in the lease which supported this contention, *that question is not before this court.* The Circuit Court of Appeals, in its memorandum authorizing this certificate (reported in 159 Federal Reporter, 1022), expressly reserved all questions except the one question which was certified, and as it was admitted that this suit was brought by individual stockholders to assert a right *in behalf of their corporation,* and as the judgment of the Circuit Court (from which no appeal was taken by appellees) *was the recognition of this derivative right,* and as the Circuit Court of Appeals in its request for instructions has described this bill as the assertion of a right *due to the Susquehanna Company* and requested instruction with respect thereto, this court has only before it the question whether the bill, to the extent that it was a stockholders' bill, was properly brought under the allegations of the bill and the proofs. This fact is made perfectly clear by the certificate itself, for while the question certified refers to the right of the appellees to maintain "this bill," the Circuit Court of Appeals had already described "this bill" as follows:

> "The bill was brought to obtain an accounting for various sums of money which it was alleged became due at intervals during a series of years from the Delaware Company TO THE SUSQUEHANNA COMPANY as rental or in the nature of rental under a lease made in 1870" (Record, p. 1).

The learned counsel for the appellees admits both in his brief and in the oral argument that all of the claim was due to the Susquehanna Company *in its corporate right,* but he sought to make a distinction between the corporate right of the Susquehanna Company to the *payment* of the rent and the *physical division* of such rent among the stockholders. Even if there was any provision in the lease which imposed the duty upon the Delaware Company to divide this portion of the rent among the Susquehanna stockholders—which there is not—the distinction between the right to *payment* and the *physical division* of the sum paid is much too fanciful and metaphysical for recognition in a stockholders' suit. IN SUCH A SUIT, THE POINT IS WHETHER THE STOCKHOLDERS ARE SEEKING TO ENFORCE, UPON THEIR INDIVIDUAL RESPONSIBILITY, A RIGHT DUE TO THEIR CORPORATION. If so, they must sustain it only upon the very urgent grounds set forth in *Hawes vs. Oakland* and Rule 94. As it is therefore admitted that the Susquehanna Company alone had the right to such *payment,* it would not be important whether the Delaware Company was under obligation to pay the money into the treasury of the Susquehanna Company, or in its behalf to divide it as the representative of the Susquehanna Company among the stockholders, for the equitable principle involved is whether a RIGHT to payment of rental, which concededly the Susquehanna corporation could exercise or forbear to exercise, could be exercised by certain stockholders *upon their individual responsibility,* simply because on their theory after the right was exercised the Delaware Company could have physically paid the amount involved directly to the stockholders for the benefit and in behalf of

their corporation. From this statement, it must not be assumed that we, in any way, concede any contract duty on the part of the Delaware Company to distribute this fund to the Susquehanna stockholders. The lease and supplemental lease can be searched in vain for any such undertaking. The Delaware Company did agree to pay directly to the stockholders seven (7) and later nine (9) per cent. dividends, *and this admittedly it has done;* and according to the appellees' contention, it further agreed that after the payment of such interest charges and *fixed* dividends, it would pay any balance TO THE SUSQUEHANNA COMPANY. As the sum in controversy is claimed to be a part of this balance, there was, as to such sum in controversy, no direct guarantee or contract whatever between the Delaware Company and the Susquehanna stockholders.

II.

APPELLEES' SECOND CONTENTION.

That a preliminary demand upon the managing body of the Susquehanna Company to bring suit was excused because such managing body could not litigate the claim against the Delaware Company without perpetrating a fraud on the court.

The learned counsel for the appellees earnestly argued that as a majority of the Susquehanna board were officially connected with the Delaware Company, no suit could be brought by them because no court would "entertain litigation in which both sides are controlled by one *dominus litis.*"

For this proposition, they chiefly rely upon *South Spring Gold Company vs. Amador Gold Company,* 145 U. S., 300. The case is not controlling as it is clearly distinguishable in its facts. In that case two companies had litigated a claim, an appeal had been taken to this court, and after the appeal the owners of the company, which was the plaintiff in error, acquired the *ownership* of the company which was the defendant in error. Of this they duly informed this court and stated that for the benefit of certain minority stockholders, they preferred to litigate the question, although the controlling owners of both companies were the same. The defendant in error filed no appearance in this court, but the brief which it had filed in the lower court before ownership was passed was submitted to this court. Under these circumstances, this court held that it would not permit the litigation to proceed, as there was no substantial antagonism between the two companies, IN VIEW OF THEIR COMMON OWNERSHIP.

The difference between that case and the case at bar is plain. There is no suggestion that the Delaware Company owned a majority of the stock of the Susquehanna Company, or that the two companies therefore had common owners, or that a suit, if one had been brought by them, would have been litigated BY A COMMON OWNER. On the contrary, the certificate clearly establishes that the Delaware Company owned less than ONE-SEVENTH (1/7) of the Susquehanna Company, and any suit therefore between the Susquehanna Company and the Delaware Company would have been conducted, not only between two separate corporate entities, but also between two entities, the controlling ownership of which was in different parties.

If the doctrine of *South Spring Gold Company vs. Amador Gold Company* were applicable to the case at bar, it is difficult to see how even this stockholder's suit could be brought, for the case is cited to justify the proposition that there can be no litigation between two corporations if they have a common controlling ownership. Therefore *if* the Delaware Company had owned a majority of the Susquehanna Company, on the contention of the appellees, a suit between them would have been a fraud upon the court, and it is difficult to understand why, on that theory, it would have been less a fraud if brought by the stockholders than by the corporation itself, for in either event, the controlling ownership of both corporations would have been in the same party. However, it is not necessary for this court to determine how two corporations, having a common ownership, can litigate their difference, for in this case, THERE IS NO SUCH COMMON OWNERSHIP, and there was therefore no insuperable obstacle to a suit between the Susquehanna and the Delaware Companies with respect to this claim.

Certainly, the *South Spring Gold Company case* (*supra*) is not authority for the proposition that if two corporations happen to have, in whole or part, the same board of directors, that a suit between them is a fraud upon the court, even though the ownership of both rests in different parties. To hold this, would be to close the doors of the courts upon many corporations in these days of close intercorporate relations. If, for example, the great railway systems of the country be taken, in many cases the legal adjustment of honest differences of opinion between different corporations having intercorporate relations would be difficult, for it is a very common thing for many boards of directors of affiliated corpora-

tions to have in part the same directors, and there has never yet been discovered any practical difficulty about an honest adjustment of their differences through litigation. Would it, for example, be contended that the Union Pacific Railroad Company could not, without a fraud upon the court, sue the Southern Pacific Railroad Company to adjust some legal question, merely because the boards of both were in whole or part composed of the same persons?

The complete answer, however, to the contention is that even if the mere fact that a majority of the Susquehanna board were connected, as officials or employees, of the Delaware Company was a *temporary obstacle* to any suit between the two corporations, IT WAS, NEVERTHELESS, THE PLAIN DUTY OF THE COMPLAINING STOCKHOLDERS, BEFORE ACTING ON THEIR INDIVIDUAL RESPONSIBILITY, TO BRING THE CLAIM TO THE ATTENTION OF THE SUSQUEHANNA BOARD, AND TO ASK THEM TO TAKE SUCH REMEDIAL ACTION BY RESIGNATION OR OTHERWISE AS, ON THE APPELLEES' THEORY, WOULD MAKE LITIGATION POSSIBLE.

The vice of appellees' argument throughout is the theory that the only duty which rested upon the individual stockholders was to demand that the Susquehanna board commence the suit, and that if such suit could not be brought by the Susquehanna board, no further duty was imposed upon the individual stockholders. But this is plainly contrary to the ruling of this court in *Hawes vs. Oakland,* in which the duty of the complaining stockholders was not limited merely to a formal demand that suit should be brought, but imperatively required that such individual stockholder should exhaust "ALL THE MEANS WITHIN HIS REACH TO OBTAIN WITHIN THE CORPORATION ITSELF THE

REDRESS OF HIS GRIEVANCES OR ACTION IN CONFORMITY TO HIS WISHES."

Such redress of grievances, in the case at bar, may have required, if the appellees' contention as to the inability of the Susquehanna board to sue be sound, the resignation of the Susquehanna board; or it may have required such action by the Susquehanna board as would insure the *bona fides* of the litigation and place it beyond the suspicion of being prejudiced by any action of an unfriendly board.

But no attempt of this kind was made, and there is nothing in the certificate to show that had the complaining stockholders requested the Susquehanna board either to resign or to put the conduct of the litigation in the hands of those who were disinterested, that such demands would not have been fully complied with. The presumption is that it would have, and in the absence of any finding of fact in the certificate to the contrary, this court must assume for the purposes of answering these questions, that had the complaining stockholders made any attempt to secure remedial action from the Susquehanna board, that that Board would have *complied with every reasonable request to insure the fair assertion of this disputed claim.*

Corbus vs. Mining Co., 187 U. S., 455.

III.

APPELLEES' THIRD CONTENTION.

That an appeal to the stockholders to co-operate in the institution of the suit was unnecessary, as the stockholders were without any corporate authority or function with respect to the conduct of litigation.

It may be fairly questioned whether the premise upon which this contention is based is sound. The law under which the Susquehanna Company was organized simply provides that "there shall be a board of thirteen directors to manage its affairs." This language is very general and does not necessarily imply any more than that in the interim between stockholders' meetings the board of directors shall have the usual powers of management over the affairs of the corporation. If the stockholders, as the owners of the property, saw fit to take corporate action at an annual or special meeting, with respect to any detail of the company's business, we think that the board of directors would not find it easy to convince a court that the very general and usual provision that they should "*manage*" the affairs of the corporation was exclusive of any action by the owners of the property to whom they stood in a trust relation.

Assuming, however, for the purposes of the argument, that the contention as to the limited powers of the shareholders is well founded, it yet fails to meet the contention of appellant, for it must be remembered that in a stockholders' suit courts of equity are compelled to deal with an *anomalous* condition of affairs, in which to prevent the perpetration of fraud theoretical corporate functions are to some extent disregarded.

Certainly there can be no contention that under the organic law of the corporation there was any power on the part of these *individual stockholders* to "manage" its affairs in the matter of the assertion of a right and the institution of a suit.

If sole regard is to be had to the legal distribution of corporate powers, then it is clear that the complainants were wholly without any legal justification for their interference with the management of the company which, on their contention, was exclusively vested in the board of directors. A court of equity, however, with its visitatorial power over corporations, to prevent wrong or fraud, so far permits a departure from the law of the corporate being as to permit, under extraordinary and urgent circumstances, the individual stockholders to do that which, theoretically and legally, the corporation itself *alone* can do. This being so, would not a court of equity equally recognize the power of ALL the shareholders to act with reference to the assertion of a corporate right where, under extraordinary circumstances, the managing body is either incapable or unwilling to assert such right? In other words, does not the contention that an appeal to the shareholders was unnecessary, because of their want of corporate authority, reduce itself to this absurdity, that while an appeal to ALL of the stockholders was unnecessary, because they had no legal power to do anything in the assertion of this claim, yet one stockholder could, without consulting his fellow stockholders, institute the suit and assert the disputed right on his individual responsibility?

The point, however, is not whether the stockholders had any corporate right to institute the suit, but whether their *command* to their trustees (the managing body) would not

have been practically potent to secure the action that was desired, and, if not, would not the failure of the managing body to respect the command of their *cestuis que trustent* move the conscience of the chancellor to enable ALL the stockholders to do that which ordinarily may be the corporate function of the managing body. If, therefore, the stockholders had a standing in equity to require their trustees to do a given act, or, in default thereof, to do it themselves, *must not a minority of such stockholders, before committing the majority to a course which the majority may perhaps disapprove, first consult the majority as to whether it is for the good of the corporation as a whole that a given right should or should not be exercised, and if exercised, how, when, and where?*

That this reasoning is sound is clearly shown by the express terms of Rule 94, the decisions of this court thereunder, and the English cases upon which it is based. We can only wonder at the courage of the learned counsel for the appellees in their assertion (page 52) that:

> "There is no case in the reports of Federal courts in which a bill has been dismissed for want of a demand upon stockholders for a resolution directing legal proceedings on behalf of the corporation."

We need not repeat the quotations from the decisions of this court in our main brief (pages 28 to 32), in which this court has *repeatedly* dismissed bills, and assigned as one reason the failure of the complaining stockholder to consult his fellow stockholders, either formally or informally, before the institution of the suit. To the same effect are the English cases, for the leading case of *Foss vs. Harbottle,* 2 Hare, 461, was decided, *inter alia,* upon the express ground that—

> "It was the duty of the plaintiff—the two shareholders who complain of what has been done—*to have called a meeting of the shareholders, or attended at some regular annual meeting, and obtain the action of a majority on the matters in issue.*"

Vice Chancellor Wigram added as a reason for the rule:

> "The majority may have been content with what was done and may have ratified the action of the board, in which case the whole body would have been bound by it."

Hawes vs. Oakland, 104 U. S., 450, as a result of which Rule 94 was promulgated, says:

> "If time permits or has permitted, he (the complaining stockholder) must show, if he fails with the directors, *that he has made an honest effort to obtain action by the stockholders as a body in the matter of which he complains,* and he must show a case, if this is not done, why it could be done, or it was not reasonable to require it."

Rule 94, in terms, requires appeal to the stockholders, for, speaking of a stockholders' bill, it provides:

> "It must also set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees, and, if necessary, *of the shareholders,* and the causes of his failure to obtain such action."

Assuming however that the shareholders had no direct corporate power with reference to the assertion of this disputed claim and the institution of this right, yet, admittedly, they had *indirectly* a very *potent power,* for it is not ques-

tioned that at the annual meetings the shareholders elected the directors, and therefore when this court considers, under the doctrine of *Hawes vs. Oakland,* whether these complainants exhausted *all* their remedies to obtain the "redress of grievances" within the corporation, it must determine whether, within the corporation, there was not the effective remedy of electing a new board to assert this claim, if the old managing board were unwilling to assert it.

Of course, if it can be shown as in *Doctor vs. Harrington,* 196 U. S., 579, and *Citizens' Savings and Trust Co. vs. Illinois Central Co.,* 205 U. S., 46, that the party sought to be sued owned a *majority of the voting power* of the corporation, the futility of an appeal to the shareholders would be obvious. But it is not disputed here that the Delaware Company did not own or control even *one-fourth* of such voting power, and the ability of the complaining stockholders, by reasonable effort, to secure a redress of their grievances within the corporation by the election of a board in harmony with their views, does not in this case rest upon presumption or conjecture, but upon *an accomplished fact.*

As it is therefore plain that there was this potent remedy within the corporation, and that no attempt was made to exercise it before the bill was filed, but that an attempt was made to exercise it after the bill was filed, it seems to follow as a necessary conclusion that the bill was prematurely brought, and that by this abuse of the stockholders' privilege, *a federal court was given jurisdiction of a controversy of which it otherwise would have had no jurisdiction whatever.*

As we have said, the two cases upon which the counsel for appellees rely to excuse their failure to apply to the

stockholders as well as to the directors, are *Doctor vs. Harrington*, 196 U. S., 579, and *Citizens' Trust Company vs. Illinois Central Company*, 205 U. S., 46.

We have fully shown in our main brief, pages 22 to 24, the radical distinction between the facts in *Doctor vs. Harrington*, where Harrington controlled *the majority of the stock of the corporation* in whose name the suit was sought to be brought, and *refused after demand to call either a stockholders' or directors' meeting*, and the case at bar where no such contention is made. There was, therefore, an appeal to the majority stockholder in the *Doctor vs. Harrington* case.

So far as the *Citizens' Trust Company vs. Illinois Central Company* is concerned, the same distinguishing fact appears that any appeal to the stockholders would have been futile because the company sought to be charged *had acquired by purchase the voting power of a large majority of the stock of the corporation* in whose right the claim was sought to be asserted (Record of case in Supreme Court, pp. 7, 9).

It furthermore appeared that The Illinois Central R. R. Co. had, by virtue of such voting power, elected a Board of Directors of the Belleville Company, "for the purpose of carrying out the fraudulent and unlawful plans and designs of said Illinois Central R. R. Co." (*Id.*, p. 10).

That said Board of Directors had *passed resolutions* "to authorize the said sale and transfer" of the property of the Belleville Company for an inadequate consideration (*Id.*, p. 10).

That thereafter a special meeting of the stockholders of the Belleville Company was held, at which the said "actions

and resolutions" of the Board of Directors of the Belleville Company were *ratified and confirmed* by the votes of the very shares, more than two-thirds in numbers "acquired, held and controlled as aforesaid by the said Illinois Central R. R. Co." (*Id.*, p. 10).

Therefore the bill alleged:

"That a demand upon the directors or officers of the "corporation itself to bring the present suit would have been "vain and futile for the many reasons heretofore set forth in "this bill of complaint" (*Id.*, p. 14).

It, therefore, appears in the case of *Citizens' Savings & Trust Co. vs. Illinois Central R. R. Co.* (1) that the board of directors of the Belleville Company had themselves participated in active frauds upon the complainant, and (2) that the third party defendant held the absolute voting-power over more than two-thirds of the stock of the Belleville Co. No one ever supposed that a demand upon either directors or stockholders was required under such circumstances. We do not think that counsel for appellees would have ventured to cite this case upon their brief, with the prominence with which they have, if the contents of the bill had been quoted or even stated in the opinion of the Court.

The counsel for appellees also seem to place much reliance upon the case of *Brewer vs. The Boston Theater*, 104 Mass., 378, 387. Thus on pages 11 and 40 of Appellee's Brief the following quotation from that case is made:

> "Where the stockholders retain no control of the corporate business, except by means of an annual election of officers, those officers, during their term of service, represent the corporation for all purposes; and a refusal by them to take proper action for the protection of its interests, or to allow the use of the

> corporate name for that purpose, ought to be sufficient to justify a proceeding in behalf of the individual stockholders, making the corporation a party defendant."

As a matter of fact, the same case came back to the Massachusetts court, after amendment of the bill, and the court "upon further consideration" (104 Mass., 392, 393) said as follows:

> "The question then comes, whether, in a case which admits of delay for the purpose of attempting to correct or redress the alleged wrong through the action of the corporation in its own behalf, such attempt must not first be made, or shown to be useless. We are inclined to hold that it must. The directors represent the corporation for the time being; *but they are not the corporation.* Annual meetings, even if special meetings are impracticable, secure to the corporators ample means of correcting abuses practiced by their officers, so far as correction is desired by the majority, or by the corporation as a body. It is not to be presumed that the body of the corporators will tolerate a wrong in their elective officers, by which they are themselves defrauded. That the present board of directors sustain or participate in the wrong, and refuse to act, or prevent action in the name of the corporation, delays the initiation of proceedings for its correction or redress. But if the delay is only temporary, and does not defeat or endanger the securing of proper redress ultimately, it does not create that necessity which is the warrant for this mode of proceeding."

We therefore contend that whatever view this court may take as to the duty or futility of a demand upon the manag-

ing body, the failure to make any attempt to obtain remedial action from the shareholders, who were quite as much interested as the complaining stockholders, is fatal to the maintenance of this bill, and upon this ground alone the bill should be dismissed.

IV.

Have the Appellees shown that they "exhausted all the means within their reach to obtain within the corporation itself the redress of their grievances or action in conformity to their wishes?"

In our oral argument we called attention to the fact that even if the contentions of the appellees were correct that an appeal to the managing body to commence this action was futile, it did not meet the requirements of the 94th Rule, or the doctrine of *Hawes vs. Oakland*. In other words, the demand upon the managing body to bring suit is not the only preliminary requisite to a stockholder's suit. The equitable doctrine is much broader and requires, in the language of this court in *Hawes vs. Oakland*, that the complainants shall exhaust "all the means to obtain within the corporation itself" remedial action, and that they cannot justify a stockholder's suit until they have shown that everything that they might reasonably have done was in point of fact done, and had failed.

Assuming for the purposes of the argument that the managing body of the Susquehanna Company could not itself litigate this question with the Delaware Company it is reasonable to ask what could the complaining stockholders

have done to obtain a "redress of their grievances" within the corporation, and what could the board of directors have done to redress such grievances. What the directors could have done, and therefore what the complaining stockholders could have asked them to do, is as follows:

1. They could have appointed a committee of their own number, composed of directors disconnected with the Delaware Company, with authority to deal with the claim. (This course was approved by the New York Court of Appeals in *Continental Ins. Co. vs. N. Y. & Harlem Co.*, 187 N. Y., 225.)

2. They could have submitted the matter to independent counsel to examine the claim, and then have submitted his report to a special meeting of stockholders for instructions.

3. They could have authorized the demanding stockholders to sue in the name of the Susquehanna Company by their own counsel.

4. Several of them could have resigned, stockholders wholly disconnected with the Delaware Company being elected as their successors, so as to leave only a minority of the whole board identified with the Delaware Company.

Any one of the courses indicated would have fully met every reasonable requirement of the situation, and would have obviated all possible objection as to a suit between common directors.

To all this, the only reply of the learned counsel for the appellees was that what the directors would have done, had such attempt been made to obtain a redress of grievances, is sufficiently indicated by that which the learned counsel insinuated that they had done.

We answer that the appellees cannot excuse their unquestioned failure to exhaust their remedies within the corpora-

tion by a sneering innuendo that the efforts in any event would have been futile. There is nothing in this certificate to show that the directors would not have met any reasonable wish that the complaining stockholders might have made with reference to the assertion of this claim; and on the authority of *Corbus vs. The Alaska Gold Mining Company,* and quoted in our main brief (pp. 20 and 21), the directors *"are presumed to act honestly and according to their best judgment for the interest of all."* To hold, upon mere conjecture, that the directors would not have complied with any reasonable request with respect to the proposed litigation is, in effect, *to condemn them before they have committed any wrong.*

This court, by Rule 94 and the equitable doctrine of *Hawes vs. Oakland,* has declined to justify the usurpation of corporate authority upon mere conjecture or innuendo. It has held that "the proof of the pudding must be in the eating," and that it does not lie in the mouth of men, who have made no demand or request, to assume gratuitously that if the demand or request had been made that they would have been ignored. Upon the conceded failure of the complaining stockholders to obtain the remedial action which we have indicated within the corporation, this court should answer both questions certified in the affirmative.

V.

The Appellant's Contention is not a Mere Technicality.

The case of the Delaware Company is not to be regarded as merely technical. *It is one of substantive right.* It made its contract with the Susquehanna Company and not with

each of its five hundred stockholders. It can fairly challenge the right of an individual to sue it on a claim, due, if at all, to a distinct corporate entity.

Moreover it is its CONSTITUTIONAL RIGHT to litigate this suit with another New York corporation in the New York courts, and of this RIGHT it has been most unjustly deprived by a premature and unwarrantable suit, brought by thirteen individuals, with whom as to the claim in controversy it made no contract and to whom as individuals it owes nothing. This court therefore should not look upon this suit with the unfavorable prepossession to which a mere technicality naturally gives rise, but in vindication of our substantive RIGHTS and of its own salutary rule of equity procedure, it should require the appellees to justify beyond doubt or cavil their usurpation of a power admittedly that of the Susquehanna Company.

Moreover, this Court should remember that to relax Rule 94 by permitting a stockholders' suit where the complaining stockholders *make no effort whatever* to obtain redress within the corporation would inevitably have the effect of further burdening this and other already overburdened federal courts with suits whose true forum is the court of the State of the contending corporations.

JAMES M. BECK,
ALFRED OPDYKE,
Counsel for Appellant.

WASHINGTON, *February* 25, 1909.

6

Office Supreme Court, U. S.
FILED.
FEB 19 1909
JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1908

No. 416

THE DELAWARE AND HUDSON COMPANY,
Defendant-Appellant,

against

ALBANY AND SUSQUEHANNA RAIL ROAD COMPANY,
Defendant-Appellee,

AETNA INSURANCE COMPANY, et al.,
Complainants-Appellees.

Certificate from Circuit Court of Appeals,
for the Second Circuit.

BRIEF AND ARGUMENT

For Complainants-Appellees.

E. PARMALEE PRENTICE,
For Appellees.

GEORGE WELWOOD MURRAY,
CHARLES P. HOWLAND,
Of Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1908

No. 416

THE DELAWARE AND HUDSON COMPANY,
Defendant-Appellant,

against

ALBANY AND SUSQUEHANNA RAIL ROAD COMPANY,
Defendant-Appellee,

AETNA INSURANCE COMPANY, et al.,
Complainants-Appellees.

Certificate from Circuit Court of Appeals,
for the Second Circuit.

BRIEF AND ARGUMENT

For Complainants-Appellees

On June 12, 1906, the Aetna Insurance Company and other complainants in this case, stockholders in the Albany and Susquehanna Rail Road Company, filed their bill in chancery in the Circuit Court of the United States for the Southern District of New York against the Susquehanna Company, and The Delaware and Hudson Company, its lessee, praying for an accounting of unpaid rent. The case is reported in the Circuit Court under the name *Aetna Insurance Co. vs. Albany and Susquehanna R. Co., et al.*, 156 Fed. 132, and in the Circuit Court of Appeals, 159 Fed. 1022.

By the lease made in 1870 the Albany and Susquehanna Rail Road Company demised its property in perpetuity to the defendant, The Delaware and Hudson Company, the lessee agreeing to pay a fixed rental, part of which was to be applied to interest on outstanding bonds, part to the payment of dividends directly to Susquehanna stockholders, and the balance of the rent, if any, to be paid to the Susquehanna Company. The payments to be made to stockholders, were, in addition to the covenants of the lease, further secured by undertakings entered into by the Delaware Company with each individual stockholder in the Susquehanna Company,—this guarantee being in every case endorsed upon the stock certificates.

The decree of the Circuit Court found the defendant Delaware Company in arrears in payment of rental to the amount, including interest, of $1,107,923.24. From this decree the Delaware Company appealed to the Circuit Court of Appeals where the case was heard and by which court, on May 22, 1908, two questions were certified to this Court for its decision.

Statement by Circuit Court of Appeals.

"The defendant corporations are both citizens of the State of New York; the complainants are citizens of the States of Connecticut and Rhode Island. The bill was brought to obtain an accounting for various sums of money, which it was alleged became due at intervals during a series of years from the Delaware Company to the Susquehanna Company as rental or in the nature of rental under a lease made in 1870. For the convenience of all" . . . "the pleadings" . . . "may be referred to for a more detailed statement of the cause of action. The bill does not "set forth with particularity the efforts of the plaintiffs to secure such

action as they desire on the part of the managing directors or trustees." Nor did the proofs show any such efforts. Nor does the bill set forth any efforts to secure "such action on the part of the shareholders." Nor did the proofs show any such efforts. Nor did the bill set forth, or the proofs show, "the causes of their failure to obtain such action" otherwise than is hereinafter disclosed.

"The complaint was filed on June 12, 1906. The Susquehanna Company was organized under the Act of April 2, 1850, which provides that 'there shall be a board of thirteen directors . . . to manage its affairs' and for many years before this suit was brought a majority of the Board of Directors of the Susquehanna Company consisted of persons who were officers, directors or employees of the Delaware Company. At the time this suit was instituted, the directors and officers of the Susquehanna Company, the dates of their election as such, and their relations to the Delaware Company with dates of election were as shown on the following statement:

Names of Directors of Susquehanna Company and dates of election as directors and officers.	Position in The Delaware and Hudson Company and dates.
Robert M. Olyphant, 1878	Director since 1872. President from 1884 to 1903. Chairman of the board since 1903.
George I. Wilber, 1883	Director since 1901.
David Willcox, 1894 (Vice-President, May 9, 1906)	General Counsel 1894 to 1903. Director since 1899. President since 1903.
R. Suydam Grant, 1901	Director since 1886.
Charles A. Peabody, 1902	Director since 1902.
William S. Opdyke, 1903	General Counsel since 1903. Director since 1905.

Names of Directors of Susquehanna Company and dates of election as directors and officers.	Position in The Delaware and Hudson Company and dates.
Abel I. Culver, 1903	A Vice-President since 1903.
Charles A. Walker, 1892	Treasurer 1892.
Robert Olyphant, 1887 (President since 1889)	Son of Robert M. Olyphant.
William L. M. Phelps, 1873 (Secretary since 1870)	Secretary of the Albany and Susquehanna Company, elected by the Board of Directors.
Robert C. Pruyn, 1890	Nominees of the Delaware Company as stated in the Delaware Company's answer.
James H. Manning, 1890	

"Of these Robert M. Olyphant, R. Suydam Grant, Charles A. Peabody, William S. Opdyke, Abel I. Culver and Robert C. Pruyn at the time this suit was begun did not own or hold in their own right any share of stock in the Susquehanna Company, but shares of stock of that company owned by the Delaware Company were transferred to each of them on the books of the Susquehanna Company by the Delaware Company for the purpose of qualifying them as such directors. Charles A. Walker owned five shares of Susquehanna stock from 1901 to 1906; it does not appear that he owned any stock in the Susquehanna Company during the year 1906.

"So far as appears from anything shown in this record none of the directors or officers of the Delaware Company ever, before or after the bringing of this suit, treated the claim therein set forth otherwise than as one of doubtful validity the payment of which was to be resisted.

"On June 12, 1906, and for thirty years prior thereto, the capital stock of the Susquehanna Company had been fixed at and limited to 35,000 shares. Of this capital stock

on June 12, 1906, the Delaware Company owned 4500 shares and its directors or officers owned or controlled 4340 shares; the complainants owned 1312 shares and a so-called Protective Committee who from and after December, 1905, had been opposing the administration of the Delaware Company upon the questions involved in this bill controlled 6688 shares. The entire 35,000 shares were held by 546 different persons, of whom 423 owned 50 shares or less, and of whom 383 resided in the State of New York.

"An annual meeting of the Susquehanna Company was held subsequent to the beginning of this suit, on October 16, 1906. At that meeting the nominees of the Protective Committee were elected, receiving 15,501 ballots, the nominees of the former management receiving 15,441 ballots. About two weeks before such annual meeting the Susquehanna Company being then controlled by the directorate above named, filed a demurrer to the bill" . . . "Copies of such demurrer were sent by stockholders opposed to the existing control to all stockholders and thereafter and before the meeting proxies for several thousand shares were received by the persons who voted for the nominees then elected."

Questions Certified.

"Upon the facts above set forth the questions of law concerning which this court desires the instruction of the Supreme Court are:

FIRST: Does the fact that before institution of this suit complainants made no demand for relief upon the Board of Directors of the Susquehanna Company prevent them from maintaining this bill?

SECOND: Does the fact that before institution of this suit complainants made no effort to obtain relief at a stockholders' meeting prevent them from maintaining this bill?"

To this Certificate the Circuit Court of Appeals attached the pleadings in the case "which may be referred to for a more detailed statement of the cause of action" (Rec. p. 1).

Complainants assert the right to maintain the present suit on two separate grounds—first as stockholders asserting the right of their corporation, and second as stockholders to whom by guarantee the Delaware Company assumed direct relations.

Determination of the questions asked by the Circuit Court of Appeals as to complainants' right to maintain this suit therefore requires consideration of complainants' relations to the transactions upon which they sue, first as stockholders in the Susquehanna Company, second as guaranteed stockholders,—stockholder-creditors,—of the Delaware Company.

The facts in regard to the first ground of jurisdiction were the subject of conflicting evidence and the findings of the court on this branch of the case are therefore stated in the certificate.

The facts in regard to the second ground of jurisdiction,—the lease, guarantee, etc.,—are fully stated in the bill and answer, and to these pleadings therefore the certificate refers,—certification of the pleadings being made advisable, when question arises under the 94th Equity Rule by the statement of this Court, that in these cases

"the court will examine the bill in its entirety and determine whether, under all the circumstances, the plaintiff has made such a showing of wrong on the part of the corporation or its officers and injury to himself as will justify the suit."

Corbus vs. Gold Mining Co., 187 U. S. 455, 463.

Immaterial statements of counsel for the Delaware Company, not justified by the Record, may be disregarded. Where they are material, the Record itself affords the correction. Some instances of material departures are as follows:

"It is undisputed that the Delaware Company did pay the fixed dividends and the annual interest and sinking fund requirements." (Brief for Delaware Company, p. 4.)

"The . . . incidental claim of the complaining stockholders, as individuals, upon a direct guaranty for a small portion of the entire sum in controversy . . ." was not allowed by the Circuit Court. (Brief for Delaware Company, pages 5 and 6.)

"There is not a pretense of any fraudulent conduct or concealment on the part of the directors of the Susquehanna Company." (Brief for Delaware Company, p. 24.)

Complaining stockholders "had slept upon their rights for many years." (Brief for Delaware Company, p. 31.)

The complainants' claim "was too recent in its invention to have ever been discussed or acted upon at any previous meeting of the shareholders." (Brief for Delaware Company, p. 31.)

BRIEF

I

Complainants are entitled under the facts stated by the Circuit Court of Appeals to sue as stockholders in the Susquehanna Company asserting rights due that Corporation.

A. COMPLAINANTS WERE NOT REQUIRED BEFORE INSTITUTING THIS SUIT TO DEMAND RELIEF FROM THE DIRECTORS OF THE SUSQUEHANNA COMPANY.

1. *The present case is not within the purpose of Equity Rule 94.*

The purpose of the rule is to prevent the maintenance of suits in Federal Courts by collusion between complainants and the defendant corporation whose rights they assert.

Hawes vs. Oakland, 104 U. S. 450;
Citizens Trust Co. vs. Illinois Central R. Co., 205 U. S. 46, 47;
Doctor vs. Harrington, 196 U. S. 579, 588;
Chicago vs. Mills, 204 U. S. 321;
Young vs. Mining Co., 71 Fed. 810;
Eldred vs. American &c. Co., 99 Fed. 168.

The Certificate shows that this suit is not collusive.

"It is true that 'this suit' was not the result of any collusion between the Susquehanna Company and the complaining stockholders." Argument for Delaware Company, p. 13.

2. The present case is not within the requirements of Equity Rule 94, as to demand upon directors. The bill shows under oath that directors were hostile, that demand upon them would be "idle and nugatory," that this is not a collusive suit, etc.

Equity will not permit double directors, by contracts made with themselves in other capacities, to bind shareholders or the corporation,

Wardell vs. Railroad Co., 103 U. S. 651;
Twin-Lick Oil Co. vs. Marbury, 91 U. S. 587.

A court will not entertain litigation in which both sides are controlled by one *dominus litis*.

South Spring Gold Co. vs. Amador Gold Co., 145 U. S. 300;
Mills vs. Green, 159 U. S. 651, 654;
East Tennessee &c. Co. vs. Telegraph Co., 125 U. S. 695.

"No decree entered under those circumstances should be permitted to stand."

Hatfield vs. King, 184 U. S. 162.

And parties who bring such litigation without disclosing the relationship of parties are guilty of punishable contempt of court.

Lord [illegible] Veazie, 8 How. 251;
Little [illegible] Bowers, 134 U. S. 547, 557;
Hatfield vs. King, 184 U. S. 162.

When directors are under adverse control stockholders may sue without demand for relief from a hostile Board.

Citizens Trust Co. vs. Illinois Central R., 205 U. S. 46.

> This was a stockholders' suit brought by the Trust Company without demand, alleging that directors were hostile and that demand "would have been vain and futile." This Court stated that the suit was "properly brought." 205 U. S., p. 47.

Doctor vs. Harrington, 196 U. S. 579;
Corbus vs. Gold Mining Co., 187 U. S. 455;
Heath vs. Erie Railway Co., 8 Blatch. 347, 409;
Bill vs. Telegraph Co., 16 Fed. 14, 19;
Columbia Dredging Co. vs. Washed Bar Sand Dredging Co., 136 Fed. 710;
Bigelow vs. Calumet & Hecla Mining Co., 155 Fed. 869;
Dickinson vs. Traction Co., 114 Fed. 232;
Eldred vs. American etc. Co., 99 Fed. 168;
Berwind vs. Canadian Pac. Ry. Co., 98 Fed. 158.
Ball vs. Rutland R. Co., 93 Fed. 513;
Weir vs. Bay State Gas Co., 91 Fed. 940;
Rogers vs. Nashville &c. Ry Co., 91 Fed. 299;
De Neufville vs. Railroad Co., 81 Fed. 10.

B. COMPLAINANTS WERE NOT REQUIRED BEFORE INSTITUTING THIS SUIT TO DEMAND RELIEF AT A MEETING OF SUSQUEHANNA STOCKHOLDERS.

Hawes vs. Oakland does not state when demand upon stockholders is necessary and when it is not, but

for a statement of "the general doctrine and its limitations" refers to *Brewer vs. Boston Theatre,* 104 Mass. 378. That case announces the rule (p. 387), that "where the stockholders retain no control of the corporate business, except by means of an annual election of officers, those officers, during their term of service, represent the corporation for all purposes" and a demand upon stockholders before bringing suit is not necessary.

Demand on stockholders was not necessary in this case because:

1. *Under Susquehanna charter stockholders could not grant relief.*

Laws of New York, 1850, Chap. 140;

"In all litigation involving the action of the corporation they (the directors) are its representatives in court." Stockholders cannot control or interfere with their management. *Railway Co. vs. Alling,* 99 U. S. 463, 472.

Pullman Co. vs. Missouri Pacific R. Co., 115 U. S. 587;
Beveridge vs. New York &c. R. Co., 112 N. Y. 1, 21, 23;
Robinson vs. Smith, 3 Paige Ch. 222;
McCullough vs. Moss, 5 Denio 567;
Conro vs. Port Henry Iron Co., 12 Barb. 27;
Morawetz on Corporations, 2d ed., Secs. 283, 510;
Cook on Corporations, 5th ed., Secs. 684, 750, and other cases.

Even if stockholders could by resolution require directors to institute litigation against the Delaware Company, they could not oust directors from office, before expiration of their terms.

Laws of New York, Act of 1850, Chap. 140, Sec. 5.

And no court would entertain a suit against the Delaware Company conducted by the Delaware administration of the Susquehanna Company.

South Spring Gold Co. vs. Amedor Gold Co., 145 U. S. 300;
Mills vs. Green, 159 U. S. 651;
East Tennesse &c. Co. vs. Telegraph Co., 125 U. S. 695.

2. *Suits are regularly maintained in Federal courts without demand upon stockholders for a resolution directing litigation.*

Ex parte Young, 209 U. S. 123;
Cotting vs. Kansas City Stock Yards Co., 183 U. S. 79;
Dinsmore vs. Southern Express Co., 183 U. S. 115;
Smyth vs. Ames, 169 U. S. 466;
Pollock vs. Farmers &c. Trust Co., 157 U. S. 429;
Greenwood vs. Freight Co., 105 U. S. 13;
Schultz vs. Highland Gold Mines Co., 158 Fed. 337;
Perkins vs. Northern Pacific Co., 155 Fed. 445;
Monmouth Investing Co. vs. Means, 151 Fed. 159;
Weir vs. Bay State Gas Co., 91 Fed. 940;
Ball vs. Rutland Railroad Co., 93 Fed. 513;
Dinsmore vs. Southern Express Co., 92 Fed. 714.

3. *No case was ever dismissed from a Federal court for want of an application to stockholders for a resolution directing litigation on behalf of the corporation.*

4. *The facts of this case show neither (a) anything which could be submitted to stockholders for ratification; nor (b) anything stockholders could ratify.*

(*a*) There was nothing to submit to stockholders.

When a stockholders' vote makes a voidable act valid or void, it acts upon something which directors have done. In this case directors have done nothing and stockholders cannot control their course.

(*b*) Stockholders can not, by anything short of a unanimous vote, authorize or ratify gifts of corporate property.

Brewer vs. Boston Theatre, 104 Mass. 378;
Jackson vs. Ludeling, 21 Wall. 616;
Ervin vs. Oregon R. & N. Co., 27 Fed. 625, 631;
Mumford vs. Ecuador Development Co., 111 Fed. 639;
Menier vs. Telegraph Works, L. R. 9 Ch. App. 350;
Gamble vs. Queens County Water Co., 123 N. Y. 91;
Farmers &c. Trust Co. vs. New York &c R. Co., 150 N. Y. 410.

5. *Complainants desiring institution of a law-suit were not required by Rule 94 to ask for election of a new board of directors.*

6. *When this suit was instituted the Delaware Company controlled the Susquehanna stock vote.*

7. *Stockholders whose corporation is in adverse control are entitled to protection by injunction.*

II

Complainants are entitled to maintain this Bill by reason of their direct relations to both defendant Corporations. Rule 94 does not apply to this case.

The Delaware Company has not only agreed with the lessor corporation by covenant in the lease to pay rent for the Susquehanna property, but by the guarantee on stock certificates has also agreed with individual stockholders that payment of this rent shall be made by dividing the corporate income as provided in the lease.

A. THE DELAWARE COMPANY HAS, THEREFORE, IN RESPECT TO CORPORATE RIGHTS OF THE SUSQUEHANNA COMPANY, ENTERED INTO PRIVITY OF CONTRACT WITH EVERY SUSQUEHANNA STOCKHOLDER, CONCERNING DIVISION OF THE ENTIRE RENT.

Hawes vs. Oakland, 104 U. S. 450.

B. STOCKHOLDERS' SUITS CANNOT BE AT LAW, FOR THE GUARANTEES ARE PART OF THE ENTIRE COVENANT TO PAY THE ENTIRE RENT ARISING FROM A SINGLE DEMISE OF CORPORATE PROPERTY.

C. AN ACTION TO DIVIDE CORPORATE INCOME AMONG STOCKHOLDERS MUST BE BROUGHT IN EQUITY, —OTHERWISE THE LESSEES' RIGHT OF OFF-SET WOULD BE DEFEATED AND UNEQUAL DIVISION OF INCOME MADE AMONG STOCKHOLDERS.

Barr vs. New York &c. Co., 96 N. Y. 444.

THE NEW YORK ACT OF 1850

In accordance with Rule 21 of this Court the relevant portions of the New York statute under which the Albany and Susquehanna Rail Road Company was incorporated are printed at length. This statute is the Act of April 2, 1850.

Section 5. There shall be a board of thirteen directors of every corporation formed under this Act, to manage its affairs. Said directors shall be chosen annually, by a majority of the votes of the stockholders voting at such election, in such manner as may be prescribed in the by-laws of the corporation, and they may and shall continue to be directors until others are elected in their places. . . .

ARGUMENT

I

Complainants are entitled under the facts stated by the Circuit Court of Appeals to sue as stockholders in the Susquehanna Corporation asserting rights due to that Corporation.

The certificate of the Circuit Court of Appeals shows that when this suit was begun the Susquehanna Company was controlled by "the administration of the Delaware Company" (Rec. p. 3), that this administration was hostile to complainants and to the assertion of the claim advanced in this case on behalf of the Susquehanna Company, and that the case at bar is not a collusive action. Complainants could not safely leave to this hostile Board of Directors the assertion of their rights, but so far as possible they complied with Rule 94, by showing the adverse control of their corporation, and by the allegation, under oath, that "no demand for "action in the premises has been made of the directors "of the Susquehanna Company, for the reason that "such demand, under the facts and circumstances set "forth, would be idle and nugatory, and that this suit "is not a collusive one to confer jurisdiction upon the "Circuit Court of the United States in respect to a "matter of which it would not otherwise have cog- "nizance." Bill of Complaint, Rec. p. 21–22.

During the progress of this litigation and as one of the developments in this case, the Delaware Company has lost control of the Susquehanna corporation. Complainants' right to maintain this bill remains, however, for

"the question of jurisdiction must be decided, having reference to the attitude of the case at the date the bill was filed."

Chicago vs. Mills, 204 U. S. 321, 328.

It is true that complainants' success works to the pecuniary advantage of the Susquehanna Company, but this does not align the Susquehanna corporation on the same side of the case with the complainants. When the bill was filed the Susquehanna Company and the Delaware Company united in opposing the claim of Susquehanna stockholders. Both corporations demurred to complainants' bill on the merits, and specifically also, asserted want of compliance with Rule 94. Both corporations then, when the suit was begun, were adverse to complainants.

"Both defendants unite, as sufficiently appears by the petition and other proceedings, in resisting the plaintiff's claim of illegality and fraud. They are alleged to have engaged in the same illegal and fraudulent conduct, and the injury is alleged to have been accomplished by their joint action. The plaintiff's controversy is with both, and both are rightfully and necessarily made defendants, and neither can, for jurisdictional purposes, be regarded otherwise than as a defendant."

Venner vs. Great Northern Ry., 209 U. S. 24, 32 and cases cited.

The question presented, therefore, by the certificate of the Circuit Court of Appeals is this:

Whether stockholders who have been injured through adverse control of their corporation must before beginning suit offer to opposing interests an opportunity to complete the wrong and injury which should be redressed. Must stockholders before beginning suit offer in good faith to put their case into the hands of their adversaries?

A. COMPLAINANTS WERE NOT REQUIRED BEFORE INSTITUTING THIS SUIT TO DEMAND RELIEF FROM THE DIRECTORS OF THE SUSQUEHANNA CORPORATION.

1. *The present case is not within the purpose of Equity Rule 94.*

The Rule this Court has said "simply expresses the principles which this Court, after a review of the authorities, had declared in *Hawes vs. Oakland,* 104 U. S. 450, to be applicable in the decision of a stockholder's suit . . ."

Venner vs. Railway Co., 209 U. S. 24, 33–34.

When a question arises then, as to the application of the Rule to the facts in any particular suit, it becomes necessary to refer to the opinion in *Hawes vs. Oakland.* The evil to be remedied the Court there said, was the increasing practice of instituting in federal courts, actions of a collusive nature, brought in the name of the stockholders, but in fact for the benefit of, and by an understanding with, the corporation itself. In such cases, the stockholder's name was a screen for the perpetration of a fraud upon the federal jurisdiction. The Court said:

"Since the decision of this court in *Dodge vs. Woolsey* (18 How. 331), the principles of which have received more than once the approval of this court, the frequency with which the most ordinary and usual chancery remedies are sought in the Federal courts by a single stockholder of a corporation who possesses the requisite citizenship, in cases where the corporation whose rights are to be enforced cannot sue in those courts, seems to justify a consideration of the grounds on which that case was decided, and of the just limitations of the exercise of those principles.

"This practice has grown until the corporations created by the laws of the States bring a large part of their controversies with their neighbors and fellow-citizens into the courts of the United States for adjudication, instead of resorting to the State courts, which are their natural, their lawful, and their appropriate forum.

"It is not difficult to see how this has come to pass. A corporation having such a controversy, which it is foreseen must end in litigation, and preferring for any reason whatever that this litigation shall take place in a Federal court, in which it can neither sue its real antagonist nor be sued by it, has recourse to a holder of one of its shares, who is a citizen of another State. This stockholder is called into consultation, and is told that his corporation has rights which the directors refuse to enforce or to protect. He instantly demands of them to do their duty in this regard, which of course they fail or refuse to do, and thereupon he discovers that he has two causes of action entitling him to equitable relief in a court of chancery; namely, one against his own company, of which he is a corporator, for refusing to do what he has requested them to do; and the other against the party which contests the matter in controversy with that corporation. These two causes of action he combines in an equity suit in the Circuit Court of the United States, because he is a citizen of a different State, though the real parties to the controversy could have no standing in that court."

Hawes vs. Oakland, 104 U. S. 450, 452–453.

Resort to federal courts upon such allegations was in fact a fraud upon Federal jurisdiction.

Dodge vs. Woolsey was decided in 1855. The fraudulent practice of which the Court spoke in *Hawes vs. Oakland* did not develop at once thereafter, but in 1875 it must have been widespread, for by the Act of March 3d, Chap. 137, Sec. 5, in that year, Congress provided that if at any time in the progress of a case begun in or removed to a United States Circuit Court, it shall appear

"that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this act, the said circuit court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed."

Following this Statute the Court in 1882 adopted Rule 94. It has been said that, so far as the Statute is concerned, the power of the court to dismiss a case which "does not really and substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court" is

"limited to disputes or controversies not within the jurisdiction of the circuit court by reason of the requisite citizenship not really existing, or being collusively obtained, as in *Hawes vs. Oakland*, 104 U. S. 450, or where, upon an examination of the record, the requisite amount is found not to have been involved, as in *Walter vs. Northeastern Railroad*, 147 U. S. 370."

Cates vs. Allen, 149 U. S. 451, 464–5.

The foregoing quotation from the dissenting opinion of Justices Brown and Jackson represents an extreme view, for the Statute is broader than the Rule and directs dismissal not only of cases in which parties have been collusively joined to create federal jurisdiction but requires dismissal of any case which "does not . . . substantially involve a . . . controversy properly within the jurisdiction of said circuit court." Under this provision the majority of the Court in the case cited held that the distinction between law and equity observed in federal courts could not be removed by State legislation and that inasmuch as complainants in the bill then under consideration had failed to make a case within the general principles of equity jurisdiction, the case could not be removed from a State to a federal court.

With such cases and with the breadth of the Statute, we are not concerned. The Rule deals with stockholders' suits exclusively, and in substance provides that a stockholder cannot sue upon a corporate right when the corporation is able and willing to protect its own rights. When a case is dismissed under the Rule, therefore, because in the words of the Statute "the parties to said suit have been improperly or collusively joined . . . for the purpose of creating a case cognizable" in a federal court, the ground of the order of dismissal is always "for want of equity" because complainant has shown "no right in himself to prosecute this suit." This was the order in *Hawes vs. Oakland*, 104 U. S. 450, 462; in *Venner vs. Railway Co.*, 209 U. S. 24 and in other cases dismissed under the Rule.

Where the parties are collusively joined within the

prohibition of the Statute, but not being stockholders' actions are not within the Rule, the order is different. Such suits are dismissed for the want of federal jurisdiction, not for want of equity.

Hayden vs. Manning, 106 U. S. 586;
Farmington vs. Pillsbury, 114 U. S. 138;
Dawson vs. Columbia Trust Co., 197 U. S. 178.

The matter, in other words, being capable of consideration from either of two points of view—in its relation to federal jurisdiction, or in its relation to complainants' capacity to sue—the operation of the Rule has been directed to the cause of action itself. A stockholder cannot sue, when the corporation is able and willing to assert its own rights, and though under the Statute the court might in these cases "look beyond the pleadings and arrange the parties according to their sides in the dispute," and this being done, dismiss the bill for want of jurisdiction,

Dawson vs. Columbia Trust Co., 197 U. S. 178, 180,
Kimball vs. City of Cedar Rapids, 99 Fed. 130, 132,

a case within the Rule being also within the Statute,

Detroit vs. Dean, 106 U. S. 537, 539,

nevertheless, proceeding under the Rule in stockholders' suits this is not done. The case in stockholders' suits is taken as the bill made it; the parties are not re-arranged; diversity of citizenship exists and therefore jurisdiction exists, but the complainants' right to sue does not exist; so far as appears the corporation is not only willing and able to maintain its rights, but in

most cases falling within the Rule, actually seeks to do so by means of the suit in the stockholders' name. The cause of action then is fictitious and the Rule, which seizes upon collusion or fiction, compels the dismissal of the bill, upon grounds which relate to this collusion or fiction.

Illinois Central Railroad Co. vs. Adams, 180 U. S. 28, 34–35.

In some aspects Rule 94 has an evident bearing on Federal jurisdiction.

On application for an order for substituted service where the Rule is not complied with and complainant seeks to bring in the corporation as a defendant

"the failure to comply with equity rule 94 not only affects the merits, but determines the proper alignment of the parties, and thus indirectly goes to the question of federal jurisdiction."

Gage vs. Riverside Trust Company, 156 Fed. 1002, at p. 1007.

In this case an order for substituted service was vacated, and unless complainants took leave to amend, the bill was to be dismissed for want of jurisdiction. The court said:

"no matter how the parties be aligned, failure to comply with equity rule 94 goes only to the merits, and it can affect the question of federal jurisdiction only when a jurisdictional arrangement is required." (p. 1008.)

The same aspect of Rule 94 appears also in cases brought to this Court under the first paragraph of Section 5, Act of March 3, 1891. The statute enacts that

in these cases "the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision." Under this provision, this Court will, when necessary, determine whether a complainant in the court below has sufficiently complied with the Rule, to be able to maintain a stockholder's suit.

Doctor vs. Harrington, 196 U. S. 579.
Chicago vs. Mills, 204 U. S. 321.

The distinction which the Court has taken, emphasizes the fact that the purpose of the Rule is to prevent collusive and fictitious suits, instituted in the name of non-resident stockholders, but by and for the benefit of the corporation. Such collusive suits are dismissed, whether demand has been made upon directors or not. As the Court remarked in a recent case, speaking of *Memphis vs. Dean,* 8 Wall. 64,

"This court ordered the bill dismissed, not because Dean and the corporation had identical interests, but because the refusal of the directors of the corporation to sue was collusive."

Doctor vs. Harrington, 196 U. S. 579, 588.

Existence of collusion between complainants and the corporation whose stock they hold, or the assertion of a fictitious cause of action upon the pretence that the corporation is opposed to its stockholders, is the test in every case which has been decided under the 94th Rule, —necessarily the test for the question before the court in every case is whether the suit as framed is real or fictitious.

The purpose and the effect of the ninety-fourth rule was to prevent collusion (p. 811). "But, where the

bill, in all of its averments, shows that the controversy is substantially between citizens of different states, and that there is no collusion, all of the ends of the rule are already met. To require more would be to exalt the means above the end."

Young vs. Mining Co., 71 Fed. 810, 811–12.
Eldred vs. American &c. Co., 99 Fed. 168.

This appears in almost every decision on the subject, and many expressions may be found, such as that in a recent case when the Court applying this Rule said:

"Upon the whole record we agree with the Circuit Court that the testimony does not disclose that the jurisdiction of the Federal court was collusively and fraudulently invoked, and the judgment below will be affirmed."

Chicago vs. Mills, 204 U. S. 321, 331.

In the present case, if the Susquehanna Company, desiring to sue the Delaware Company, had by arrangement with complainants caused the present suit to be instituted in the federal court the proceeding would have been collusive, under the Statute and the Rule, and the case would have been dismissed.

In fact the case at bar shows a situation the direct reverse of this. The Delaware Company and the Susquehanna Company were under an identical management,—a management which the Certificate of the Circuit Court of Appeals describes, in relation to the Susquehanna Company, as "the administration of the Delaware Company" (Rec. p. 3). The Certificate further states that "so far as appears from anything shown in this record none of the directors or officers of the Delaware Company ever, before or after the bringing of this suit, treated the claim therein set forth

otherwise than as one of doubtful validity the payment of which was to be resisted" (Rec. p. 2).

There is no collusion, on the part of complainants, then, in the present case. On the other hand, the two defendant corporations being under one single management were,—if an identical management can be said to collude with itself,—acting in collusion for the benefit of the Delaware Company. Both were hostile to complainants, and when the suit was instituted both united in resisting the bill. Neither is there a fictitious cause of action, for the Susquehanna Company was as much opposed to complainants as was the Delaware Company itself. Under these circumstances, then, as the Court recently said, "The plaintiff's controversy is with both" (*Venner vs. Railway,* 209 U. S. 24, 32).

Complainants' bill, therefore, brought into court a real controversy. In this case,—as in *Doctor vs. Harrington,* 196 U. S. 579—the complainants' corporation was in hostile control and in the one case as in the other,

"it is manifest that if the matter alleged be true, complainants will suffer irremediable loss if not permitted to sue, and as they had a cause of action they rightly brought it in the Circuit Court of the United States."

Doctor vs. Harrington, 196 U. S. 579, 588–9.

So, too, in *Citizens Trust Co. vs. Illinois Central R. Co.,* 205 U. S. 46, a stockholder's suit where no demand had been made upon directors because under hostile control, this Court said (p. 47):

"Assuming the allegations of the bill to be true, the suit is not a collusive one, and could be properly brought by a stockholder . . ."

2. The present case is not within the requirements of Equity Rule 94 as to demand upon directors.

The Rule in purpose and substance provides that stockholders may not assert a right owing to the corporation when the corporation is able and willing itself to assert the right. To prevent such collusive suits by stockholders, the Rule requires stockholders, before coming into court, to apply in good faith to the corporation for relief. Only when this has been done, and the corporation has in good faith refused to act, can stockholders take its place and assert its rights. The demand for relief, then, must be made upon the corporate authority having power to grant relief.

A demand upon the directors for relief which the stockholders only can grant, or a demand upon the stockholders for relief which the directors only can grant, would be no demand at all and would not satisfy the provisions of the Equity Rule.

In the present case the relief desired was to be obtained only by a litigation instituted and prosecuted in good faith against the Delaware Company, solely in the interest of the Susquehanna Company.

The institution and prosecution of a litigation is a matter wholly within the power of the Board of Directors of the corporation,—a matter with which stockholders have nothing to do. The question, then, which arises in the present case, concerning the meaning and construction of Equity Rule 94 is, whether the Board of Directors constituted as stated in the Certificate of the Circuit Court of Appeals was able and willing to grant the relief to which complainants were and are entitled.

Complainants insist that they are not required to

leave the redress of grievances with the parties of whom they complain. If the persons to be sued control the corporation which should sue, that corporation is not "able and willing" to compel redress. "No man," Mr. Madison said, "is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity" (Federalist No. X).

Counsel for the Delaware Company assert that although the Boards of Directors of the two corporations may have been composed of the same persons, nevertheless the two capacities may be kept distinct. One sufficient answer to this argument is that the two capacities were not kept distinct. Control of the Susquehanna corporation by officers and representatives of the Delaware Company is described by the Circuit Court of Appeals as *"the administration of the Delaware Company"* (Certificate, Rec. p. 3). Counsel for appellant ignore this fact. They insist that it was the duty of stockholders to leave the litigation between the two corporations in the hands of the gentlemen who directed the affairs of the Delaware Company.

If this duty exist, the merits of the controversy are unimportant. The right to legal and equitable remedies against the Delaware Company is of value only upon the condition that it be vested in some person other than the Delaware Company itself.

The reference to the pleadings for a more detailed statement of the cause of action shows that for over a year before this suit was begun, the Susquehanna directors acting with and for the Delaware Company, had sought by misrepresentation and suppression of important facts in their official communications to Susquehanna stockholders, to procure from those

stockholders authority for a stock issue which would have protected the Delaware Company from the liability now in suit. (Bill of Complaint, folios 23–27.) The answer of the Delaware Company admits the facts upon which the charges are based. (Answer folios 110–111.)

The Delaware Company asserts, by its answer in this case, that it has fully performed its obligations to the Susquehanna Company, and that it has not "at any time failed to pay any amount by way of rental, which it was bound to pay" (Rec. p. 69). Both the Delaware Company (Rec. p. 45) and the Susquehanna Company (Rec. p. 81)—then under "the administration of the Delaware Company,"—demurred to complainants' bill on the merits. The answer of the Delaware Company, denying all liability, was verified under oath by Charles A. Walker, a director of the Susquehanna Company. The Delaware demurrer was supported by the oath of David Willcox, another Susquehanna director and Vice-President of the Susquehanna Company, and both answer and demurrer bore the signature of William S. Opdyke, a third Susquehanna director, while Robert Olyphant, a fourth director and President of the Susquehanna Company, signed the Susquehanna demurrer.

The bill of complaint alleges that a demand for relief upon these men and their associates would have been "idle and nugatory" (Rec. pp. 21–22). Here we have the answer to this allegation, in which Susquehanna directors acting for the corporation acquit the Delaware Company of all indebtedness.

As an act of reciprocity the Delaware Company, over its corporate signature, certifies to the complete integrity of those who thus receipt to it in full. All

the Susquehanna directors, the Delaware Company asserts,

"while acting as directors of the Susquehanna Company, always fully performed their duties to the Susquehanna Company and its stockholders, never believing that their relations to this defendant required them to act unjustly toward the Susquehanna Company." (Answer, Rec. p. 73.)

After this assurance of the Delaware Company, that Susquehanna directors had "always fully performed their duties to the Susquehanna Company" and from Susquehanna directors that the Delaware Company had always fully paid its debts and owed nothing, it might be expected that the Susquehanna Board would frankly state that it would not sue for money which, it asserted, was not owing.

No such course is followed. The Delaware Company,—fully informed as to what Susquehanna directors would or would not have done,—alleges upon information and belief, that if demand had been made by complainants upon the Susquehanna Company before beginning this suit, "such action would have been taken by the said company in that behalf as should have been advised by disinterested counsel learned in the law and in no way connected with this defendant to be proper and expedient" (Rec. p. 75).

Defendant admits, then, that complainants are entitled at least to "disinterested" representation, and that in litigation with the Delaware Company—whatever might be the connection of Susquehanna directors—the Susquehanna counsel should not be "connected with this defendant." Susquehanna directors were personally charged with misdoing,—still, so the answer states,—this disinterested representation would have

been provided for the Susquehanna Company, had we been willing only to trust these directors a little further.

Would this selection of counsel and these assurances have met and satisfied complainants' right to substantial and bona fide relief? Better, far, the course of continued neglect so long followed, than that Susquehanna rights should be litigated, and become *res adjudicata*, in a suit conducted by counsel chosen and directed, by Delaware representatives, whose conduct furnishes the subject matter of litigation.

"These men, while holding a trust relation for each company, were assuming at the same moment to act both for the lessee and the lessor. This double action on their part was inconsistent with their legal duty to each company. In plain language, it was a clear breach of trust, and their action was capable of being impeached in a court of equity, on the part of any stockholder who felt himself aggrieved."

Marie vs. Garrison, 13 Abb. N. C., 210, 229.

"It is among the rudiments of the law that the same person cannot act for himself and at the same time, with respect to the same matter, as the agent of another whose interests are conflicting. Thus a person cannot be a purchaser of property and at the same time the agent of the vendor. The two positions impose different obligations, and their union would at once raise a conflict between interest and duty; and 'constituted as humanity is, in the majority of cases duty would be over-borne in the struggle' (*Marsh vs. Whitmore*, 21 Wall, 178, 183). The law, therefore, will always condemn the transactions of a party on his own behalf when, in respect to the matter concerned, he is the agent of others, and will relieve against them whenever their enforcement is seasonably resisted. Directors of corporations, and all persons who stand in a fiduciary relation

to other parties, and are clothed with power to act for them, are subject to this rule; they are not permitted to occupy a position which will conflict with the interest of parties they represent and are bound to protect."

Wardell vs. Railroad Co., 103 U. S. 651, 658;
Twin-Lick Oil Co., vs. Marbury, 91 U. S. 587, 588.

If then a court of chancery will not permit these double directors and officers to bind complainants by any contract which they may make with themselves in other capacities, will the court compel complainants to leave to these directors control of the litigation brought to review their dealings?

Upon this question the position of the Supreme Court is emphatic. A litigation between two corporations under the same control will not be heard in this Court, and a judgment rendered by the court below will be reversed so that stockholders may protect their own rights.

South Spring Co. vs. Amador Co., 145 U. S. 300.

To bring such a litigation "is an abuse which courts of justice have always reprehended, and treated as a punishable contempt of court."

Lord vs. Veazie, 8 How. 251, 255;
Little vs. Bowers, 134 U. S. 547, 557.

"And no decree entered under those circumstances should be permitted to stand."

Hatfield vs. King, 184 U. S. 162, 166.

On the other hand, when the corporation is in adverse control a long line of cases support stockholders' suits. The latest decision is *Citizens' Trust Co.*

vs. Illinois Central R. Co., 205 U. S. 46, 47, a suit brought by a stockholder in the Belleville Company against that Company and the Illinois Central Railway to assert rights owing to the Company by the Railway. The bill alleged that the directors of the Belleville Company were elected by and were under the control of the Railway—

"That a demand upon the directors or officers of the corporation itself, to bring the present suit would have been vain and futile, for the many reasons heretofore set forth in this bill of complaint. That the present suit is not collusively brought for the purpose of giving this Court jurisdiction."

Record of case, p. 19, paragraph XVIII.

The situation, then, was almost precisely the situation at bar. Upon this subject, Mr. Justice Harlan in his statement of the case said (page 47):

"Assuming the allegations of the bill to be true, the suit is not a collusive one, and could be properly brought by a stockholder of the Belleville Company, making that company a defendant."

This is in line with *Doctor vs. Harrington*, 196 U. S. 579 where the subject of demand upon hostile directors had previously been considered at some length, and where this Court had held such demand unnecessary. In *Doctor vs. Harrington* the complainants, stockholders in the Sol Sayles Company, filed their bill against their corporation, John J. Harrington and others, to compel Harrington and other defendants to surrender to the company assets which they had diverted to themselves. No demand had been made upon the directors of the corporation that action be taken in

the corporate name, but the bill alleged as sufficient reason for not making this demand that complainants were unable to secure corporate action, the Board being under "the absolute control and domination of the defendant John J. Harrington," who had "declined to redress the wrongs of which complaint is herein made, or to give the complainants any opportunity to lay before the Board of Directors . . . the facts herein set forth."

It was alleged that Harrington, like the Delaware Company in the case at bar, "directed the management of the affairs of the corporation" in which he was a stockholder, "dictated its policy, and selected its directors,"—but Harrington was not, so far as appears from the report of the case, either an officer or a director of the Sol Sayles Company.

The meaning of the charge that Harrington had refused "to give to the complainants any opportunity to lay before the Board of Directors . . . the facts herein set forth," does not appear. There is no corporate duty on the part of officers, directors or approving stockholders "to give opportunities" to stockholders who consider themselves aggrieved. The allegation is by no means equivalent to a statement that Harrington could or did prevent Doctor and the other complainants from making to the directors and officers of the Sol Sayles Company any communication, which complainants might see fit to make. There is no attempt in the bill to assert that the act of making demand was impossible, dangerous, or even in any way difficult. It is obvious, however, that if Harrington directed the management of the affairs of the corporation, dictated its policy and selected its directors, communications to that Board of Directors requesting corporate

action against Harrington would afford complainants no relief. The suit was not a collusive suit and this Court held that it was well brought in the United States Court.

The question then in every case is the question of collusion. Are the complainant stockholders and the defendant corporation in fact on opposite sides or are they acting together? The demand and refusal mentioned in the 94th Rule are significant only on this question. *Dodge vs. Woolsey*, 18 How., 331, held that refusal of the directors to sue caused the demandant stockholders and the corporation to

"occupy antagonistic grounds in respect to the controversy." (p. 295.)

But the means by which antagonism is reached are unimportant. The question is whether complainants are in fact as well as in form opposed to the defendants. If so, and if the parties on the two sides of the case are citizens of different States, federal jurisdiction exists in fact as well as in form.

Hawes vs. Oakland, 104 U. S. 450, modified the rule of *Dodge vs. Woolsey* by emphasizing the fact that where antagonism is shown only by the refusal of directors to sue to protect corporate rights, the refusal "must be real, not feigned."

Doctor vs. Harrington, 196 U. S. 579, 588.

Where the antagonism between the corporation and the complaining stockholder is nominal and not real, the most technical compliance with every form required by the Rule will not save the suit,

Hendrickson vs. Bradley, 85 Fed. 508. Certiorari denied, 171 U. S. 686.

while on the other hand, where the antagonism is genuine, complainants will not be required to put their rights into keeping of their adversaries. This is the whole extent of the Rule. A stockholder cannot sue on behalf of the corporation when the corporation is able and willing, in good faith, to assert its own rights. On the other hand, the Rule does not require stockholders to turn over protection of their rights to those who oppose them and profit by their defeat. The Rule is capable of reasonable construction. When collusion is suggested, the court will take into account the matters to which the Rule calls attention among other indicia of collusion.

"Under those circumstances a court of equity should scrutinize with the utmost care the conduct of the plaintiff and see that he has done everything which ought to have been done to secure action by the corporation and its directors," etc.

Corbus vs. Gold Mining Co., 187 U. S. 455, 465.

But the Supreme Court has refused to lay down any definite rule applicable to all cases.

"This court will examine the bill in its entirety and determine whether, under all the circumstances, the plaintiff had made such a showing of wrong on the part of the corporation or its officers and injury to himself as will justify the suit."

Corbus vs. Gold Mining Co., 187 U. S. 455, 463.

There has been no suggestion that, to prevent collusion on the part of complainants, the Rule will be so construed as to foster collusion between defendants.

In the lower federal courts and in State courts the

subject has often been considered and decisions with few exceptions are harmonious.

"It is sufficiently clear, in view of the action of the directors here, and their present attitude in affirming the validity and expediency of the lease, that any effort to induce them to take action in behalf of the corporation to annul it would be futile. The ceremony of an application to them on behalf of the complainant would be farcical. It may, therefore, be dispensed with, and the allegations of the bill in this behalf are probably in substantial compliance with Rule 94."

Bill vs. Western Union Tel. Co., 16 Fed. 14, 18.

When the corporation is controlled by a hostile board of directors

"it would be mockery to require or permit a suit against them to be brought and prosecuted under their management."

Blatchford J. in *Heath vs. Erie Railway Co.*, 8 Blatch. 347, 409.

To a Board of Directors or a body of stockholders thus constituted and influenced a formal demand for remedial action in the corporate name against the wrongdoer would be mere idle ceremony not required by law.

Columbia Dredging Co. vs. Washed Bar Sand Dredging Co., 136 Fed 710;
Bigelow vs. Calumet & Hecla Mining Co., 155 Fed. 869;
Eldred vs. American Car Co., 99 Fed. 168;
Berwind vs. Canadian Pacific Ry. Co., 98 Fed. 158;

Ball vs. Rutland R. R. Co., 93 Fed. 513;
Weir vs. Bay State Gas Co., 91 Fed. 940;
Rogers vs. Nashville &c. Ry. Co., 91 Fed. 299;
De Neufville vs. Railroad Co., 81 Fed. 10;
Aitken vs. Colorado R. &c. Co., 72 Fed. 591.

"If it is apparent in a case like the present, that the directors, who are alleged to have offended, are still in control of the corporation, and so implicated in the alleged wrongdoing as to make it certain that a demand upon them to right such wrong or to bring suit for that purpose would be an idle ceremony, it would be unreasonable to require such demand to be made."

Dickinson vs. Consolidated Traction Co., 114 Fed. 232, 241.

"To require complainants to show that they had exhausted all effort in inducing the directors to convict themselves of fraud, is absurd."

Excelsior Co. vs. Brown, 74 Fed. 321, 323.

"It would be unreasonable to expect the directors to institute a proceeding against themselves, and, should they do such a thing, the bad faith of their action would be so apparent that no court would entertain the suit."

Hingston vs. Montgomery, 121 Mo. App. 451; 97 S. W. 202, 204.

A stockholder may sue without demand where the persons who committed the wrongful acts continue to be directors of the corporation or where the corporation is in adverse control.

Hanna vs. Lyon, 179 N. Y. 107;
Green vs. Hedenberg, 159 Ill. 489;

Smith vs. Dorn, 96 Cal. 73;
Pittsburgh &c. Ry. Co. vs. Dodd, 115 Ky. 176;
O'Connor vs. Virginia &c. Power Co., 184 N. Y. 46;
Von Arnim vs. Am. Tube Works, 188 Mass. 515;
Wineburgh vs. U. S. &c. Advertising Co., 173 Mass. 60;
Morawetz on Corporations, 2d ed., Sec. 242.

It would be wholly contrary to established principles of justice to permit the authors of a wrong to conduct a litigation against themselves as agents of the injured complainant.

Crumlish vs. Railroad Co., 28 West Va. 623.

B. COMPLAINANTS WERE NOT REQUIRED BEFORE INSTITUTING THIS SUIT TO MAKE DEMAND FOR RELIEF AT A MEETING OF STOCKHOLDERS OF THE SUSQUEHANNA CORPORATION.

So far as concerns this subject the requirement of Rule 94 is that plaintiff in a stockholder's bill

"set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part . . . if necessary, of the stockholders, and the causes of his failure to obtain such action."

The Rule assumes that in some cases the relief desired requires action from stockholders, and that in other cases no such action is necessary. No line of distinction between these two classes of cases is there drawn, for the reason that the Rule deals only with the allegations of a bill of complaint. It does not change substantive corporation law. It is not difficult then to

determine the distinction which the Court had in mind, for in announcing the principles embodied in Rule 94, the Court referred to a decision which defined the circumstances under which application to stockholders was necessary.

"Where the stockholders retain no control of the corporate business, except by means of an annual election of officers, those officers, during their term of service, represent the corporation for all purposes; and a refusal by them to take proper action for the protection of its interests, or to allow the use of the corporate name for that purpose, ought to be sufficient to justify a proceeding in behalf of the individual stockholders, making the corporation a party defendant."

Brewer vs. Boston Theatre, 104 Mass. 378, 387.

Of this decision the Court said—

"In *Brewer vs. Boston Theatre* (104 Mass. 378), the general doctrine and its limitations are very well stated."

Hawes vs. Oakland, 104 U. S. 450, 457.

No other distinction between the cases in which application to stockholders is necessary and those in which it is not, is suggested in *Hawes vs. Oakland* or in any subsequent case.

Furthermore—when the relief desired has been the institution and prosecution of a litigation for the assertion of corporate rights, this Court has frequently stated the substance of the Rule, without mention of any application to stockholders as in such cases a possible requirement. Thus in *Davis & Farnum Co. vs. Los Angeles*, the Court said:

"General equity rule 94 requires, that such a bill must contain an allegation under oath that the suit is not a

collusive one to confer on a court of the United States jurisdiction, and must also contain an allegation that the directors of a corporation have refused to institute the proceedings themselves in the name of such corporation, and the efforts of the plaintiff to secure such action on the part of the directors, and the cause of his failure to obtain it."

Davis & Farnum Co. vs. Los Angeles, 189 U. S. 207, 220.

Finally in a recent opinion, referring to cases where relief was to be had only by a law-suit, this Court seems to have excluded an application to stockholders from the proper reading of the Rule. In the case mentioned the Court said:

"The right of a stockholder to sue a corporation for the protection of his rights was recognized, the condition only being the refusal of the directors to act, which refusal, it is said, must be real, not feigned."

Doctor vs. Harrington, 196 U. S. 579, 588.

In this case the Court held under the facts, that even a demand upon directors was not necessary. The matter which is now of importance is that in so holding the Court referred to the hostile position of the directors as the "*only*" condition of the right of a stockholder to sue in his own name.

The Rule does not require, then, that plaintiff should always seek relief from stockholders. Questions which stockholders are competent to decide, must go to them for decision, but it is never necessary to submit to stockholders questions beyond their corporate power.

Furthermore, even questions which stockholders are competent to decide need not always be decided by resolution at a stockholders' meeting. If stockholders

are competent and willing to grant relief a vote may be necessary, but where aggrieved stockholders find eighty per cent. of the stock of a corporation arrayed against them, there is no rule which makes the vote at a stockholders' meeting exclusive evidence that appeal to stockholders is hopeless. Rule 94 makes no reference to stockholders' meetings, or to stockholders' votes. This, however, is the precise question asked by the Circuit Court of Appeals in this case, viz., Whether the fact that before institution of this suit complainants made no effort to obtain relief *"at a stockholders' meeting"* prevents them from maintaining this bill. It appears from the Certificate that for six months before this bill was filed there had been among Susquehanna stockholders an active opposition to the administration of the Delaware Company upon the matters involved in this suit, and that when the bill was filed the complainants holding 1312 shares and other stockholders, having altogether 6688 shares, measured the whole strength of the opposition.

The Circuit Court of Appeals, appears, like the Circuit Court, to consider this application to stockholders sufficient to answer every construction of the Equity Rule—unless it was necessary for complainants, already in a minority of three to one, to await a meeting and an adverse vote.

We believe that the question which arises under Rule 94, is in every case a practical question—whether directors first, and stockholders second, are able and willing to grant a remedy to injured parties.

When a large majority of stockholders unite in opposing the grant of any remedy this practical question is answered.

It is not necessary, however, to stop with one an-

swer, for the fact that in the present case stockholders were neither able nor willing to grant relief appears in many ways. We proceed therefore to consider the corporate power of stockholders in the Susquehanna Company, the nature of the relief to which complainants were entitled, the construction of Rule 94, and the extent of Delaware control of the stock vote when this bill was filed.

In the case at bar the relief desired was the institution and prosecution in good faith, of a litigation against the Delaware Company. It was not necessary to demand this relief of Susquehanna stockholders, for the following reasons:

1. *Under the charter of the Susquehanna Company stockholders had no power to grant relief, being unable to authorize or direct the institution of a suit or to control, influence or affect the prosecution of a suit once instituted.*

The Albany and Susquehanna Rail Road Company was incorporated under the New York Railroad Law of 1850 (Laws of N. Y., 1850, Chap. 140), Sec. 5 of which is, in part, as follows:

"Section 5. There shall be a board of thirteen directors of every corporation formed under this act, to manage its affairs."

The meaning of this provision is well understood.

"In a sense, the stockholders of a corporation own its property, but they are not the managers of its business or in the immediate control of its affairs."

Pullman Co. vs. Missouri Pacific Ry., 115 U. S. 587, 597.

Directors manage the business of the corporation and it is for this reason only that under Rule 94 application must be made to them.

The refusal of the board of directors, it is said,

"is essential in order to give the stockholder any standing in court, as the charter confers upon the directors representing the body of stockholders, the general management of the business of the company."

Memphis vs. Dean, 8 Wall. 64, 73.

It follows from this statement that when the relief sought is the institution of a law suit no demand upon stockholders is necessary, the *"only"* condition of a stockholder's right to sue being found in the adverse position of the Board of Directors.

Doctor vs. Harrington, 196 U. S. 579, 588.

This is emphatically shown in the case of *Railway Company vs. Alling,* 99 U. S. 463. In that case the stockholders at a meeting resolved to discontinue suits which were pending in this Court. The directors voted that the appeals should be prosecuted. The motions to dismiss were presented by counsel for stockholders and opposed by counsel for directors. This Court said:

"The present appeals are being prosecuted to final judgment by order of the directors or trustees of the appellant corporation. To them, by law, is committed the management of the property and concerns of the corporation. In all litigation involving the action of the corporation they are its representatives in court. . . . Their right, while in the exercise of their legitimate functions, to manage the affairs and suits of the company, ought not to be controlled or interfered with by this Court by reason of anything

which appears upon the pending motions. . . . The motions are, therefore, denied, and we proceed to an examination of the cases upon their merits."

This general rule is the law of New York.

In *McCullough vs. Moss*, 5 Denio 567, the question arose under the Laws of 1837, Chap. 396, Sec. 3, which provided that—

"The business and affairs of the said corporation shall be conducted by five directors."

The stockholders of the corporation attempted to make a corporate note by resolution at a meeting and the court held they could not thus bind the corporation, for (p. 575),

"The affairs of the corporation were to be conducted by five directors, a majority of whom formed a board for the transaction of business, and a decision of a majority of those duly assembled as a board was requisite to make a valid corporate act (1 R. S. 600, Sec. 6). The authority of the Board to the president and secretary was therefore necessary to give validity to the note. This was not shown. The resolution passed at the meeting of the stockholders contained in the letter of the secretary dated October 6, 1839, could not bind the corporation, especially so as to affect the members not present. When a charter invests a board with the power to manage the concerns of a corporation the power is exclusive in its character. The corporators have no right to interfere with it, and courts will not, even on a petition of a majority, compel the board to do an act contrary to its judgment (Angell and Ames on Corp. 121 to 123, 151 to 164). The stockholders as such in their collective capacity could do no corporate act. The directors were their representatives and alone authorized to act. It is one of the fundamental conditions of the contract into

which the corporators have entered by becoming members of the corporation, that its concerns shall be managed in the manner prescribed by the act of incorporation and from this no essential departure can be made."

In *Conro vs. Port Henry Iron Co.*, 12 Barb. 27, 63, where, as usual, the management of the corporation was confided to directors, it was held that a lease executed in pursuance of a resolution of the stockholders of a corporation was void, because the power of managing the business of the company was vested solely in the Board of Directors. So, the lease of a railroad property is made by the directors, not by stockholders. "The power to make it is, like all other general powers of management, lodged in the directors."

Beveridge vs. New York &c. R. Co., 112 N. Y. 1, 21, 23.

In *Robinson vs. Smith*, 3 Paige's Chancery 222 (N. Y. 1832), it was held that stockholders could not sue directors in the name of the corporation.

In *Day vs. Ogdensburgh &c. R. Co.*, 107 N. Y. 129, 145, the court said:

"The statute declares that every corporation organized as the defendant was, under the Act of 1850 (Chap. 140, § 5), shall have a board of directors to manage its affairs; and it must follow that, so long as no provision of law is violated, they are subject to no other supervision than that of the legislature."

These cases show the application of the word "management" to corporate affairs. The stockholders cannot make corporate notes, settle business claims, exe-

cute leases, or bring suits in the corporate name. These matters, being within the management of the corporation, are for directors, and "when a statute covers the whole subject, and prescribes the persons who may bind a corporate body and the manner in which they may bind it, resort cannot be had to other instrumentalities. The designation of certain agents and methods for the doing of an act implies a prohibition of any others." *Landers vs. The Frank Street Church,* 97 N. Y. 119, 124; *People ex rel. Attorney General vs. Utica Insurance Co.,* 15 Johns. 357; *N. Y. Firemen Insurance Company vs. Ely,* 2 Cow. 678; *Crocker vs. Whitney,* 71 N. Y. 161. Where stockholders try to usurp the powers of directors, the directors as the corporation's authorized agency can defeat them. *People vs. North River S. R. Co.,* 121 N. Y. 582, at p. 620. In fact, when the directors, in the management of the company, act *intra vires* and in good faith their authority is exclusive. Stockholders can neither instruct them nor control their action. The board of directors of a corporation have implied authority to do all acts in the management of the company's regular business which the company itself can do without a departure from its charter.

Dickerman vs. Northern T. Co., 176 U. S. 181, p. 193;
McMullen vs. Ritchie, 64 Fed. 253, 263;
Thompson on Corporations, Sec. 3974 *et seq.*;
Cook on Corporations, 5th ed., Secs. 684, 750;
Morawetz on Corporations, 2d ed., Sec. 511.

But, even if the corporate power of stockholders had enabled them by resolution to require directors to

institute litigation against the Delaware Company, nevertheless they could not oust directors from office before expiration of their term;

> Laws of New York, Act of 1850, Chap. 140, Sec. 5.

and no court would entertain a suit against the Delaware Company conducted by the Delaware administration of the Susquehanna Company.

> *South Spring Gold Co. vs. Amador Gold Co.*, 145 U. S. 300;
> *Mills vs. Green*, 159 U. S. 651;
> *East Tennesse &c. Co. vs. Telegraph Co.*, 125 U. S. 695.

Counsel for appellant, therefore, insist that even where stockholders can afford no relief directly, a demand must still be made upon them, if by electing a new board relief can indirectly be given. Upon this construction stockholders can grant relief in every case in which directors can grant relief. The rule, then, to justify the argument of counsel for appellant should be changed. The words "if necessary" should be omitted. As the rule stands complainants are commonly required to demand relief from the directors, and "if necessary" from the stockholders.

The relief desired in the case at bar was the institution and maintenance in good faith of a litigation against the Delaware Company.

But if demand for relief from stockholders was necessary, and if stockholders had no authority to institute and control a litigation, what, according to the con-

struction of counsel for appellant, would be the nature of the relief which complainants should have sought from stockholders? Plainly not a demand for institution of a litigation, but a demand for the election of a new Board of Directors,—a different demand, and one which often might be unjustifiable even where litigation should unquestionably be instituted. This would not be demanding relief from stockholders, but demanding a revolution in corporate management affecting matters with which the litigation might be wholly disconnected.

2. *Suits are regularly maintained in Federal courts without showing a previous demand upon stockholders for a resolution directing the institution of legal proceedings.*

A demand upon stockholders is never necessary where the matter is one in which directors have full power,—for in these matters stockholders are represented by directors. Thus a stockholder may sue

"in a case where application has first been made to the directors of the company to institute the suit in its own name, and they have refused. This refusal of the board of directors is essential in order to give the stockholder any standing in court, as the charter confers upon the directors representing the body of stockholders, the general management of the business of the company."

Memphis vs. Dean, 8 Wall. 64, 73;
Davis vs. Los Angeles, 189 U. S. 207.

Following this rule, stockholders' suits are regularly maintained without showing a previous demand upon stockholders for a resolution directing the institution of legal proceedings.

Cotting vs. Kansas City Stock Yards Co., 183 U. S. 79.

In this case the bill alleged a demand upon "the corporation and the acting president and managing director." Refusal was by order of the Board of Directors. See Record of case, p. 40. No demand upon stockholders.

Dinsmore vs. Southern Express Co., 183 U. S. 115.

The bill of complaint alleged that the "control, direction, management, and operation" of corporate affairs was by charter given to directors (Record of case, p. 3); that demand for litigation addressed to the corporation and its directors had been made to the Board of Directors and refused by the board (Record of case, p. 8); that the suit was not collusive, etc. No demand was made upon stockholders.

This Court approved the frame of the bill.

Smyth vs. Ames, 169 U. S. 466.

In this case demand was made upon the president and refused by order of the Executive Committee of the Board of Directors. Record of case, p. 24. No demand upon stockholders.

Pollock vs. Farmers' Loan & Trust Co., 157 U. S. 429.

Demand on directors only. Record of case, pp. 8, 10.

Perkins vs. Northern Pacific Ry. Co., 155 Fed. 445;
Weir vs. Bay State Gas Co., 91 Fed. 940;
Schultz vs. Highland Gold Mines Co., 158 Fed. 337;
Monmouth Investing Co. vs. Means, 151 Fed. 159;
Greenwood vs. Freight Co., 105 U. S. 13;
Ball vs. Rutland Railroad, 93 Fed. 513;
Dinsmore vs. Southern Express Co., 92 Fed. 714.

Ex parte Young, 209 U. S. 123, was an application in this Court for a writ of habeas corpus to review an order of the Circuit Court in Minnesota punishing petitioners for contempt. This order was made in a stockholders' suit, and the question presented to this Court concerned the jurisdiction of the court below.

If the stockholders who filed the bill had failed to show a situation which permitted them to assert the rights of the corporation, the court below might have had jurisdiction to dismiss the bill, but certainly would have had no jurisdiction to protect the corporate right by injunction or otherwise. The jurisdictional nature of Rule 94 is evident at this point, for here it touches the subject matter of the suit.

This Court, therefore, examined the allegations of complainants' bill, and showed that complainants averred a demand of the president and managing directors (209 U. S. p. 130). No demand upon stockholders was shown. Of this bill the Court said (p. 143):

"We find that the complainants in the suit commenced in the Circuit Court were stockholders in the Northern Pacific Railway Company, and the reason for commencing it and making the railroad company one of the parties defendant is sufficiently set forth in the bill. *Davis &c. Co. vs. Los Angeles,* 189 U. S. 207, 220; Equity Rule 94."

In the following cases the complainants' bill was dismissed—because the directors' refusal to sue was collusive.

Detroit vs. Dean, 106 U. S. 537;
Quincy vs. Steel, 120 U. S. 241;
Corbus vs. Gold Mining Co., 187 U. S. 455;
Dawson vs. Trust Co., 197 U. S. 178.

Finally in *Doctor vs. Harrington,* 196 U. S. 579, 588, we reach the statement, that when the relief sought is the institution of a law-suit to protect corporate rights application to the directors is the *"only"* condition of a stockholder's right to sue.

3. *There is no case in the reports of Federal courts in which a bill has been dismissed for want of a demand upon stockholders, for a resolution directing legal proceedings on behalf of the corporation.*

There are cases, like *Huntington vs. Palmer,* 104 U. S. 482, in which, dismissing collusive and fraudulent suits the Court has referred, as evidence of collusion, to the fact that no appeal was made either to directors, or to stockholders nor "that a single stockholder was consulted by the complainant" (p. 484).

There are cases holding that where stockholders have legal authority to grant the relief to which complainants are entitled, and where the stock vote is not subject to adverse control, a demand should be made upon stockholders. No instance can be found in which a law-suit instituted by a stockholder in good faith and without collusion was dismissed because complainant before filing his bill had failed to ask of stockholders a resolution directing institution of an action in the corporate name.

The case of *Taylor vs. Holmes*, 127 U. S. 489, does not touch the present question. In that case stockholders in a New York corporation, whose period of existence as fixed by its charter had expired, filed a bill "for themselves individually" and for such other stockholders as might join to assert rights owing to the corporation. The corporation itself was not made a party to the suit, complainants alleging that its officers were dead, that but one director survived, and as to this single survivor, it was charged that he was incompetent.

The Court held that under the laws of New York the existence of a corporation continued after the period fixed by charter, so far as necessary to wind up its business, collect its assets, pay debts, etc. This winding up could not be accomplished by stockholders suing "for themselves individually" (p. 490), etc., and the bill was dismissed. In order to wind up the corporation the company itself must to some extent be revived and for this purpose an appeal to stockholders might be necessary.

4. *The facts of this case show neither (a) anything which could be submitted to a stockholders' meeting*

for ratification, nor (b) anything, which even if within the corporate powers of stockholders, they could legally ratify.

(*a*) There is nothing capable of submission to stockholders.

It is familiar law that if directors make a conveyance or payment to, or a contract with themselves, the act—subject to certain limitations—is voidable not void, and may be confirmed by a vote of stockholders. Under these circumstances there is a corporate act capable of submission to stockholders, and their vote, operating directly upon this act is in itself effective. The stockholders' resolution, without further corporate action, produces its own proper result. Affirmance or disaffirmance being within the jurisdiction of the stockholders, their resolution makes a voidable act void, or valid and binding, as the case may be.

The present litigation, however, involves no such matter. A stockholders' vote ratifying the conduct of Susquehanna directors would not have deprived the board of power to institute suit the next day, nor would a resolution disapproving directors' conduct have compelled the institution of a suit.

There was nothing, therefore, capable of submission to stockholders; no corporate act upon which their vote could operate, and no obligation upon complainants before beginning suit, to ask for a vote which would have done nothing and been nothing.

(*b*) Even had the corporate power of stockholders been greater, they could not, as against any complaining shareholder, have sanctioned the exces-

sive benefits permitted the controlling shareholder out of the common fund.

The Certificate of the Circuit Court of Appeals shows that the Delaware Company has for many years controlled the administration of the Susquehanna Company, and that by means of this control, it has not only received the dividends upon its stock in the Susquehanna Company, at the same rate paid to other Susquehanna stockholders, but also that in addition to these payments it has—without compensation to the Susquehanna Company—secured possession of a sum of money equal to about one third of the entire capital stock of the corporation.

In *Pondir vs. New York &c. R. Co.*, 72 Hun 384, 389, where property had been transferred without consideration, it was held that a stockholders' bill would be sustained. "Such frauds are not uncommon in the management of corporations, and when they are exposed should be condemned by the courts and a heavy hand laid upon all who participate in them." Authorities on the subject are numerous.

"A majority of the corporators have no right to exercise the control over the corporate management, which legitimately belongs to them, for the purpose of appropriating the corporate property or its avails or income to themselves or to any of the shareholders, to the exclusion or prejudice of the others. And if any have obtained such unfair advantage by fraud or abuse of the trust confided to them as officers or agents of the corporation, it is not in the power of a majority to ratify or condone the fraud and breach of trust, so far as it affects the rights of the others, without reasonable restitution. . . . But the indirect appropriation of the common property, profits or means of profit, to their own benefit, by any portion of the corporators, in fraud of their

associates, is equally incapable of being authorized or ratified by the vote of a majority of the corporators, or by any act or omission of the corporate body. *Gregory vs. Patchett,* 33 Beav. 595; *Atwool vs. Merryweather,* Law Rep. 5 Eq. 464."

Brewer vs. Boston Theatre, 104 Mass. 378, 395.

The decision cited has the approval of this Court, *Hawes vs. Oakland,* 104 U. S. 450, 457.

"The corporation itself holds its property as a trust fund for the stockholders who have a joint interest in all its property and effects, and the relation between it and its several members is, for all practical purposes, that of trustee and *cestui que trust.* . . . When several persons have a common interest in property, equity will not allow one to appropriate it exclusively to himself, or to impair its value to the others. Community of interest involves mutual obligation. Persons occupying this relation towards each other are under an obligation to make the property or fund productive of the most that can be obtained from it for all who are interested in it; and those who seek to make a profit out of it at the expense of those whose rights in it are the same as their own are unfaithful to the relation they have assumed, and are guilty, at least, of constructive fraud."

Ervin vs. Oregon R. & N. Co. (*C. C. A.*), 27 Fed. 625, 631–2;
Jackson vs. Ludeling, 21 Wall. 616, 622.

Although a majority of stockholders may have full power to bind the body of stockholders in respect to transactions within the scope of the corporate powers, they have no right to exercise that power to appropriate corporate property to themselves at an inadequate price.

Ervin vs. Oregon R. & N. Co., 20 Fed. 577.

In *Mumford vs. Ecuador Development Co.*, 111 Fed. 639, 643, the court after citing a number of leading cases said:

"The rule deducible from all these cases is that although a majority may lawfully make a contract with the company such contract will be scrutinized with much greater care than if made with a third party, and unless it appears that it was made honestly and for an adequate consideration a court of equity will interpose to prevent such contract from being used oppressively and in violation of the rights of the minority. It matters not in what form these rights are invaded; it is the business of equity to penetrate through subterfuges and discover the actual transaction stripped of all disguises. . . .

"The theory upon which the courts interfere in such cases is tersely expressed by Sir William M. James in *Menier vs. Telegraph Works*, 9 Ch. App. 350. He says:

" 'The minority of the shareholders say in effect that the majority have divided the assets of the company, more or less, between themselves, to the exclusion of the minority. I think it would be a shocking thing if that could be done, because if so, the majority might divide the whole assets of the company, and pass a resolution that everything must be given to them, and that the minority should have nothing to do with it.

"In *Gamble vs. Q. C. W. Co.* 123 N. Y. 91, . . . Judge Peckham, in effect, said that, although it is not every question of mere administration or of policy upon which there might be a difference of opinion that would justify the minority in coming into a court of equity to obtain relief, yet, where the action of a majority of the stockholders of a corporation is fraudulent or oppressive to the minority shareholders, an action may be maintained by the latter, where

the contemplated action of the majority is so far opposed to the interests of the corporation as to lead to a clear inference that such action is with an intent to serve some outside purpose, regardless of the consequences to the company and inconsistent with its interests." . . . "*Sage vs. Culver* (147 N. Y. 241) is to the effect that when it can fairly be gathered that the officers and directors of a corporation have made use of relations of trust and confidence to secure or promote some selfish interest, it is enough to set a court of equity in motion, and to require them to explain such a transaction which there is a presumption against in equity."

Farmers' Loan & Trust Co. vs. N. Y. & N. R. Co., 150 N. Y. 410, 426, 427.

In *Atwool vs. Merryweather* reported as a note in L. R. 5 Eq., at p. 464, Vice-Chancellor Sir W. Page Wood held that a majority of stockholders could not gratuitously condone a fraud. "The whole thing," said Vice-Chancellor Wood, "was obtained by fraud, and the persons who may possibly form a majority of the shareholders, could not in any way sanction a transaction of that kind."

See, too, *Hazard vs. Durant*, 11 R. I. 206–207.

"The attempt is to strip the company of its property, in which the complainant as a stockholder has a direct interest, and there is such a disregard of duty and non-performance of manifest official obligation, amounting to what the law considers a breach of trust, that it is a case in which the stockholder has a right to interfere. It does not involve a discretion as to the bringing of suit which ought properly to be left to the judgment of the board of directors or of the majority of the stockholders, for here a portion of the corporate property and the exercise of the franchises of the

company over the route in question are in jeopardy, and its officers, in disregard of their duty, are consorting with its enemies . . ."

Weidenfeld vs. Sugar Run Co., 48 Fed. 615.

5. *Complainants desiring institution of a law-suit were not obliged by Rule 94 to ask for election of a new Board of Directors.*

Counsel for the Delaware Company argue that even though stockholders cannot institute and manage a litigation directly, they can indirectly effect this result by election of a new board of directors, and that for this reason complainants were bound by the 94th Equity Rule, to apply to stockholders for election of a new board, before they could be justified in filing a bill in their own name. *No case can be found in which a bill filed by stockholders in good faith and without collusion was dismissed because complainants had failed to make this demand.* Stockholders desiring one relief are not obliged by the Rule to ask for something else—which they may not want. If they desire a law-suit they need not ask for a corporate revolution and the election of a new Board. If the stockholders cannot instruct the existing Board to institute a law-suit, they cannot instruct the new Board. If the new Board then have the matter in their entire discretion to determine, the corporate revolution amounts to nothing more than this—that stockholders being without power to grant relief refer complainants to the one corporate authority competent to act. A reference to somebody else is not relief. If the 94th Rule included within its contemplation every consequence which stockholders might indirectly effect by election of new directors the

words "if necessary" would have been omitted, for by this construction stockholders would pass upon every question; and reference to them in every case would be necessary. The term of office for directors and officers —which now under the Susquehanna charter lasts a year—would necessarily be shortened, for every reference to stockholders would be answered by the election of a new Board—or else stockholders would be limited to granting relief in one case per year. For all this, which is involved in appellant's argument, we find no authority. The Rule requires good faith in appealing to federal courts. As evidence of this good faith it requires, in certain circumstances, a demand for relief from the corporate authorities competent to grant relief. The question in every case, therefore, is of corporate authority,—under the charter, what person or persons have power to redress the grievance of which complaint is made?

In the case at bar this question is answered by reference to the Susquehanna charter.

6. *At the time this action was instituted the Delaware Company controlled the stock vote of the Susquehanna Company.*

(*a*) No rule of law defines stock control as registered ownership of a majority of outstanding shares.

"No rule of law makes the control of a corporation depend upon the ownership of a majority of all its shares. On the contrary, the rule, of course, is that a majority in interest of the shareholders present at the corporate meetings from time to time govern the corporation. And it is notorious that many shareholders habitually neglect to attend

corporate meetings, or take any part whatever in the affairs of the corporations of which they are members, and many others habitually hand over their votes to the dominant shareholder or group of shareholders. In this way the number of shares needed to control a corporation is reduced much below a majority of the entire issue: how much below is a question of fact to be determined in each particular case. Only in the ideal instance where all the shareholders might be expected to attend the corporate meetings would it hold true that a majority of all the shares of a corporation is required to control it. On all sides in the business world are instances where the control of a corporation is just as firmly held through the ownership of a large minority of its shares as through the ownership of a majority, and the knowledge that this is so is acted upon every day. In a recent inquiry by the Interstate Commerce Commission a member of a banking house, with probably as much experience in such matters as any other in the world, testified that even 29.59 per centum of the shares of a railroad corporation were generally sufficient to give control. It is therefore perfectly evident that if control is shown to exist in fact, it is a mere non-essential, whether it exists by virtue of the ownership of a majority of the shares of the corporation or of a smaller number; and unless this is recognized and acted upon by the courts, as it has been by bankers and promoters of corporate combinations, the way to evade the decision, that the act of Congress"—the Sherman Act—"reaches the form of monopoly resulting from the concentration of controlling stock interests in competing railroads in the same hands, is clear, simple, and certain."

> "The Federal Anti-Trust Act and Minority Holdings," by Mr. G. Carroll Todd, 22 Harv. Law Rev. 117.

The testimony to which Mr. Todd refers is that given before the Interstate Commerce Commission by

Mr. Kahn of the firm of Kuhn, Loeb & Company and mentioned in the Report of the Commission contained in 12 Int. Com. Rep. 277, at p. 294.

In the present case the Susquehanna stock owned or controlled by the Delaware Company amounted to 25.25 per cent. of the entire capital stock of the company. The Delaware Company therefore lacked a little of the number of shares which Mr. Kahn—and the Commission, 12 Int. Com. Rep. 294—considered "sufficient generally to secure a dominating interest."

In the Special Report of June 30, 1906, the Commission referring to the fact that stock control is almost invariably maintained through minority holdings, remarked (p. 37),

"Yet, because of the wide distribution of majority ownership, the stock being in many cases held for investment in small lots by individuals, and because the proxies of such holders are frequently signed as a matter of form and without any investigation, these minority holdings in concentrated form virtually dominate the situation and dictate the policy of the corporation whose securities are thus held."

And, on p. 44,

"The conclusion is indisputable that railway corporations do not purchase railway stocks widely for purposes of investment, but that their holdings in the stocks of other railways are rather for the purpose of controlling or influencing the management of corporations whose operations are of real concern to the holding company."

The number of shares necessary to make stock control in particular cases therefore will vary. Where control has been established and maintained for a number of years, however, there is a legal presumption, no change being shown, that this control continues.

(*b*) When this bill was filed the Delaware Company controlled the stock vote of the Susquehanna Company.

The Certificate shows that for many years before this suit was brought the Delaware Company had elected its candidates on the Susquehanna Board of Directors; that a Committee of Susquehanna stockholders had for six months before the suit was brought "been opposing the administration of the Delaware Company upon the questions involved in this bill" (p. 3), and that at the end of this time, Committee and complainants together could vote upon 8000 shares only.

The remainder of the stock therefore, did not oppose the administration of the Delaware Company upon the questions involved in this bill.

Complainants did not institute their suit hastily nor until six months' agitation among stockholders had disclosed the fact of stock control. The statements of the Certificate therefore justify the allegation of the bill that the Delaware Company controlled the stock vote of the Susquehanna corporation. This allegation is further justified by the developments since the institution of this litigation.

It has been said that control being once shown to exist, there is a legal presumption, no change being shown, that this control continues. Three months and a half after this suit was begun, and just before the annual meeting of Susquehanna stockholders, the directors of the Susquehanna Company aligned the corporation with the Delaware Company in opposing upon the merits the claim advanced on behalf of Susquehanna stockholders. Their action was com-

municated to all Susquehanna shareholders "and thereafter and before the meeting proxies for several thousand shares" (p. 3) were received by opponents of the Delaware Company with the result that out of an extraordinarily large vote the Delaware Company was defeated by sixty votes.

The Certificate, then, states all the facts which constitute stock control, it shows the extent of the control when the bill was filed, and the events which caused the change.

It shows further a vigorous and far reaching campaign by those who opposed Delaware control, but *no construction of Rule 94 requires a campaign for corporate control.* Had complainants delayed bringing suit, and in October, 1906, in strict conformity with appellant's construction of the rule submitted to the stockholders represented at the annual meeting the question of proceeding against the Delaware Company, the Delaware Company would have controlled the vote on that question.

Sending out campaign literature to stockholders before a meeting is an expensive undertaking and effective only when followed by vigorous campaigning employing the time and service of many experienced persons. When this is not done, a stockholders' meeting—even of the largest corporations—is an assembly of a few persons who witness the proxy committee of the administration cast the official ballot.

The memory of those best acquainted with the history of corporate affairs during the last half century may safely be challenged to produce another instance in which a corporation situated as the Delaware Company was when this suit was begun has failed to hold the control it then had.

7. Complainant stockholders were entitled to protect themselves by suit in equity, against the danger that the Delaware Company, being in control of the Susquehanna Board, might at any time cause the two corporations—lessor and lessee—to make such adjustment and compromise as would seriously embarrass the Susquehanna Company.

In the case of the Harlem Company leased to the New York Central—a recent and very conspicuous case—such an adjustment was in fact made; and when the Continental Insurance Company filed its bill, the suit was too late.

Continental Insurance Co. vs. New York and Harlem R. Co., 187 N. Y. 225.

Complainants were not bound to put themselves into the hands of the Delaware Company, either in fact or in theory; and for this reason, when the present bill was filed, complainants prayed for an injunction whereby

"the defendants may be enjoined and restrained from making any settlement of the matters in controversy or from entering into any reference or arbitration of them without leave of this honorable court, and that for the purposes aforesaid a temporary restraining order may issue." (Rec. p. 22.)

When the whole subject was thus brought before the court, complainants were protected from such compromise as until the bill was filed, might have been made by the Delaware Company in its own interest.

The situation of stockholders whose corporation is

in the hands of their adversaries is an extremely difficult one. Unless stockholders sue, their rights are subject to a compromise in which adverse parties represent both sides. If stockholders anticipate this disaster by instituting legal proceedings they are met by the constructions of the 94th Rule which counsel for the Delaware Company advance.

We submit that the Rule has no applications to such a case as the one at bar.

II

Complainants are entitled to maintain this Bill by reason of their direct relations to both Defendant Corporations.

Before taking up this subject it is necessary to refer to the statement of counsel for appellant that the bill cannot be treated both as a stockholders' bill and as a bill by guaranteed stockholders, for it is argued this would make the bill multifarious. The Circuit Court, it is said, granted no pecuniary relief individually to complainants and upon this statement counsel argue—

> "The consequence of this action by the Circuit Court was not only to avoid the objection of multifariousness, but also to eliminate all question of the right of guaranteed stockholders to sue in equity, some in behalf of all others."
>
> (Memorandum of Delaware & Hudson Company upon Appellees' Motions to Advance, p. 4.)

To this we answer:

(*a*) Complainants' rights as guaranteed stockholders are not "eliminated." The questions certified by the Circuit Court of Appeals ask whether we can maintain the bill. Complainants assert two grounds for the same relief. If the bill can be maintained on either ground the questions are answered.

(*b*) The purpose of referring to, and attaching the pleadings to, the Certificate was to place both these grounds of relief before this Court.

(*c*) Since the lease, and guarantees to stockholders, were all parts of the transaction upon which we sue, we can sue in no other way than by placing the whole transaction before the court.

(*d*) No question of multifariousness is certified to this Court.

(*e*) The bill was not multifarious.

Aetna Ins. Co. vs. Albany & Susquehanna R. Co., 156 Fed. 132.

The question of complainants' right to sue by reason of their direct relations with both defendant corporations being before this Court, we proceed to a consideration of this second branch of the case.

In accordance with the provisions of the lease the Delaware Company has endorsed upon Susquehanna stock certificates, a reference to the lease and has agreed with stockholders to pay directly to them certain sums out of the annual rent arising from the leased property.

It is complainants' contention and the substance of the bill of complaint that the lease established a fixed rent to be paid annually by the Delaware Company; that the Delaware Company agreed to pay annually

out of this fixed sum certain interest charges, etc., and to divide the balance by payments to the stockholders, and to the corporation. This contention was sustained by the decree of the Circuit Court.

We are not here concerned with any question as to the correctness of this decision.

The subject brought before this Court, in this aspect of the case, is whether Rule 94 prevents complainants from submitting for judicial construction such a case as is made by the complainants.

We believe that the Delaware Company has assumed the obligation to divide among Susquehanna stockholders certain Susquehanna income, an obligation which, in the absence of this contract, would rest upon the Susquehanna corporation alone. The Delaware Company then can be sued directly by Susquehanna stockholders whenever it fails to perform this duty, just as the Susquehanna Company could be sued by its own stockholders. Obviously no demand need be made upon the Susquehanna corporation before bringing such a suit, for the purpose of the action would be to compel performance of a duty owing by the Susquehanna Company directly to its stockholders, and, as against the Delaware Company, to compel it to perform the contract by which it assumed this duty. Holders of guaranteed stock, in other words, where the guarantee provides for payments to stockholders out of a fixed income,—as is true in many leases—occupy a position which in some respects differs from that of the ordinary stockholders, and while this difference is not such as to affect the distribution among stockholders of the earnings of the common property —equality being the rule in every case; and no preferences, and no remedies which would result in the

establishment of preferences, being permitted—nevertheless guaranteed stockholders having a direct relation to the guarantor by whom the payments are made and being entitled to certain equal payments, have the right to compel these payments and equal distribution.

All rent, owing by the Delaware Company, arises out of the lease of property belonging to the Susquehanna corporation. If the covenant of quiet enjoyment be broken, the obligation to pay rent ceases. All rent which accrues is corporate income.

Pacific R. R. vs. Atlantic & P. R. Co., 20 Fed. 277.

By arrangement between the parties it may be paid in any manner upon which the parties agree, but however paid it must be credited upon the indebtedness to the Susquehanna corporation arising out of the use of corporate property.

If, therefore, the payment be made to other parties than the Susquehanna corporation, those parties necessarily receive it in the corporate right—not in their own right. All sums which this action is brought to collect are therefore sums which are owing to the Susquehanna corporation.

What, then, is the importance of the Delaware guarantee?

Corporate income—creditors having first been provided for—belongs to the corporation for the benefit of its stockholders. Division of surplus income ordinarily is made by the corporation itself—the dividend being declared by the Board of Directors and paid by corporate officers.

In the case at bar no dividend has been declared and

no funds are in the possession of the Susquehanna corporation. In place of the method of division ordinarily followed, the stockholders have authorized the corporation to entrust this division to the Delaware Company, upon its undertaking with each stockholder to pay and divide—the payment of Susquehanna rent being made by the very act of division. To speak with logical precision, therefore, the rent is claimed in the corporate right of the Susquehanna Company, but the division of corporate income is claimed in the right of the stockholder.

The practical result of this union of interests—payment and division being substantially identical except in logic—is by giving stockholders a direct right to compel division to give an indirect right to compel payment. This indeed is the very purpose of a stock guarantee, contemplated when the stockholders were brought in to participate in the making of a corporate contract.

In a bill filed for this purpose, when the corporation is in adverse control, complainants may pray that the division among stockholders of money recovered by the corporation be made under the orders of the Court.

Dunphy vs. Traveller Newspaper Ass'n, 146 Mass. 495;
Crumlish vs. Shenandoah Valley R. Co., 28 W. Va. 623.

These principles and the right of complainants to file the present bill in their own name are suggested by the decision in *Hawes vs. Oakland,* so much discussed in this case.

"That the vast and increasing proportion of the active business of modern life which is done by corporations

should call into exercise the beneficent powers and flexible methods of courts of equity, is neither to be wondered at nor regretted; and this is especially true of controversies growing out of the relations between the stockholders and the corporation of which he is a member. The exercise of this power in protecting the stockholder against the frauds of the governing body of directors or trustees, and in preventing their exercise, in the name of the corporation, of powers which are outside of their charters or articles of association, has been frequent, and is most beneficial, and is undisputed. These are real contests, however, between the stockholder and the corporation of which he is a member.

"The case before me goes beyond this.

"This corporation, like others, is created a body politic and corporate, that it may in its corporate name transact all the business which its charter or other organic act authorizes it to do.

"Such corporations may be common carriers, bankers, insurers, merchants, and may make contracts, commit torts, and incur liabilities, and may sue or be sued in their corporate name in regard to all of these transactions. The parties who deal with them understand this, and that they are dealing with a body which has these rights, and is subject to these obligations, and *they do not deal with or count upon a liability to the stockholder whom they do not know and with whom they have no privity of contract or other relation.*"

Hawes vs. Oakland, 104 U. S. 450, 453.

Here, then, is the authoritative statement of the rule which requires assertion of corporate rights in the corporate name; the exposition of the principles on which the rule rests and the class of cases to which it applies. From this one fact it is obvious,—that Rule 94 applies only to cases in which no direct relations

exist between stockholders and persons dealing with their corporation.

Into contests between stockholders and their corporation *"the outsider, dealing with the corporation through its managing agents* in a matter within their authority, cannot be dragged . . ."

Hawes vs. Oakland, 104 U. S. 450, 454.

In the case at bar, the Delaware Company is not an outsider, it has dealt not alone with the Susquehanna corporation, but with every Susquehanna stockholder, and with each stockholder—including individually the complainants in this suit—it has entered into privity of contract, by a written guaranty running under its corporate seal. We do not seek to drag the Delaware Company into litigation with "stockholders whom they do not know," for the Delaware Company which might have occupied strictly the position of an "outsider,"—a third party leasing corporate property and paying rent to the lessor Company,—has voluntarily abandoned this position and assumed the corporate duty of the Susquehanna Company to divide among stockholders the rent owing to the lessor.

Since now this duty is not performed and an action has become necessary who shall be made defendants?

Plainly the action must be brought against the Albany and Susquehanna Rail Road Company, the corporation which owes the duty,—and against the Delaware and Hudson Company, the corporate agent of the Susquehanna, holding in its treasury the money which it should have paid and divided.

No other suit can be framed which gives to com-

plainants the relief to which they are entitled. In a case like the one at bar the New York Court of Appeals said:

"It would seem that it is only through an equitable action that the proper relief can be obtained, and but for this the plaintiffs would be without means of redress."

Barr vs. New York &c. R. Co., 96 N. Y. 444, 452.

Such a suit must, of course, be on behalf of all stockholders, for if separate suits by different stockholders were permitted one of two results would follow—either the tenant would lose as against the portion of the rent involved in these suits its right to assert whatever off-set it might lawfully have, or, on the other hand, it would be compelled to take the whole off-set out of the portion of rent going to stockholders who sued first. Plainly such separation of interests is impossible, and plainly, too, the off-set must be taken out of the whole rent. The action which guaranteed stockholders are entitled to bring in their own name must, therefore, as has been said, be brought in equity on behalf of all stockholders similarly situated.

The guarantee endorsed upon the stock certificate is not a separate contract, made every time a new certificate issues, but is part of the covenant to pay rent. Taken by itself there is no consideration for the guarantee. Taken with the lease the demise of the entire property is the single undivided consideration for the entire covenant to pay and divide the entire rent.

In the last analysis therefore a "guarantee of dividends" when applied to such a case as that at bar is an inaccurate phrase which seems to describe a simple relationship, but in fact covers two entirely distinct relations.

As lessee of the Railroad property the Delaware Company is bound to pay the agreed rent, and if out of the lease claims arise in its favor against the Susquehanna Company, the lessee is as to these claims a creditor of the lessor entitled to payment before any sum be paid to or on account of, the Susquehanna Company. No action can be brought against the lessee in such form as to defeat this right of off-set. The only action which can be brought to compel payment of the rent must be therefore one single action on the lease to collect the entire sum due.

So far as the Delaware Company by virtue of its contracts of "guarantee" occupies the position of agent for the Susquehanna corporation to divide corporate income among stockholders it is subject to the same legal proceedings that could be brought against the Susquehanna Company itself. It must be observed, however, that no dividend has been declared. The lease and guaranties were made nearly forty years ago. They fixed a rent out of which dividends at a certain rate would naturally arise,—nevertheless the operation of the contract is subject to all ordinary contingencies. The lessee, for example, might become entitled to make deductions from the rent before payment. In the present case, for example, the Delaware Company claims allowance of offsets which would absorb all dividends for many years to come. A suit upon the guarantee is not therefore a suit to collect a dividend which has been earned and declared, but is strictly a suit to determine the amount of net corporate earnings and to compel distribution. Such a suit must be by bill for an accounting in equity.

Cook on Stock and Stockholders, 5th ed., Sec. 542, and cases cited.

Whether the present action be considered as a stockholders' bill asserting contract rights due to the corporation, or as a guaranteed stockholders' bill enforcing a corporate contract to which the stockholders as a body are parties, the nature of the action and the relief sought are identical—a bill enforcing a corporate contract and praying for an accounting of the entire rent arising upon a single demise of a single property.

There is a certain complexity in the relations of stockholders who are guarantee-holders at the same time, but the complexity arises from the facts, not from the form of the suit arising upon the facts.

E. PARMALEE PRENTICE,
for Aetna Insurance Company and other
Complainants-Appellees.

GEORGE WELWOOD MURRAY,
CHARLES P. HOWLAND,
Of Counsel.